89-1052

DEC 28 1989

NO.

in the Supreme Court of the United States

October Term, 1989

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., ROLLING OAKS HOMEOWNERS' ASSN., INC.; MILDRED HARRIS; BARRY YOUNG; and NORINE FLETCHER,

Petitioners,

vs.

DOLPHIN STADIUM CORP., a Florida corporation; JOSEPH ROBBIE; DADE COUNTY, a political subdivision of the State of Florida; LAWRENCE MORTON, EMIL MORTON, individually and as Trustees, LOTTIE MORTON, individually and as Trustee, ALAN MORTON, and MAX BODERMAN, d/b/a/ MORTON PROPERTIES; SOUTH FLORIDA REGIONAL PLANNING COUNCIL

Respondent.

PETITION FOR CERTIORARI REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A RESTRICTIVE COVENANT FREELY ENTERED INTO BY A PRIVATE LANDOWNER FOR THE BENEFIT OF ADJACENT LANDOWNERS MAY BE ABROGATED BY LEGISLATION.

II.

WHETHER A FEDERAL COURT MUST GIVE RES JUDICATA EFFECT TO A DECISION OF A THREE-JUDGE STATE APPELLATE COURT AFFIRMING A ZONING ACTION, TO BAR A CLAIM BASED ON VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS, WHERE THE FEDERAL APPELLATE COURT FINDS THAT THE PARTIES HAD NO OPPORTUNITY TO LITIGATE THE CONSTITUTIONAL ISSUES BEFORE THE ZONING TRIBUNAL.

III.

WHETHER A FLORIDA APPELLATE COURT REVIEWING A ZONING PROCEEDING HAS JURISDICTION TO MAKE ITS OWN FINDINGS OF FACT ON DISPUTED LEGAL ISSUES.

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GROUNDS FOR JURISDICTION

1. The federal Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

2. The federal Court of Appeals has decided a federal question in a way which conflicts with decisions of the state court of last resort. Rule 17(c), Rules of the Supreme Court of the United States.

3. The federal Court of Appeals has decided a federal question in a way which conflicts with decisions of the Court of Appeals for other circuits. *F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed.2d 398 (1967).

4. The federal Court of Appeals, in deciding a res judicata or collateral estoppel issue, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

OPINION OF FEDERAL COURT OF APPEALS

1. Reported at 878 F.2d 1360 (11th Cir. 1989) [Appendix].

2. Opinion filed August 3, 1989.

3. Petitions for Rehearing and Suggestions of Rehearing En Banc denied October 4, 1989 [Appendix].

STATEMENT ON JURISDICTION

Jurisdiction is based on 28 U.S.C. § 1254, which provides that

> Cases in the courts of appeal may be reviewed by the Supreme Court . . .
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

This petition for writ of certiorari is timely under 28 U.S.C. § 2101(c), which provides that "any . . . writ of certiorari intended to bring any judgment or decree in a civil action . . . before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such or decree."

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 10:

> No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver, Coin a Tender in Payment of Debts; *pass any* Bill of Attainder, ex post fact Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.

CONSTITUTION OF THE UNITED STATES, AMENDMENT VII

> *In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved*, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

> 1. Citizenship rights not to be abridged by states. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

LOCAL ORDINANCE INVOLVED

Dade County Code, Sec. 33-316. Exhaustion of remedies; court review.

No person aggrieved by any zoning resolution order, requirement, decision or determination of an administrative official or by any decision of the zoning appeals board may apply to the court for relief unless he has first exhausted the remedies provided for herein and taken all available steps provided in this article. It is the intention of the board of county commissioners that all steps as provided by this article shall be taken before any application is made to the court for relief; and no application shall be made to the court for relief except from resolution adopted by the board of county commissioners, pursuant to this article. *Zoning resolutions of the board of county commissioners shall be reviewed by the filing of a notice of appeal* in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedure and within the time provided by the Florida Rules of Appellate Procedure for the review of the rulings of any commission or board; and such time shall commence to run from the date the zoning resolution sought to be reviewed is transmitted to the clerk of the commission.

CITATIONS TO THE RECORD

The citation "R" refers to documents contained in the record prepared by the clerk of the court. Documents in the record are more particularly referenced by one of four volumes in the record where there may be found ("Vol."); item number in the volume ("It."); the complaint ("compl."), which is item 1, volume 1 of the record; and as exhibits attached to the complaint ("Ex."). "Tr." refers to the transcript of the zoning hearing. Opinions of the state courts reviewing the zoning action are part of the record. The opinion of the

Court of Appeals is included in the appendix to the petition and referenced by ("App."). The parties will be referred to as they appeared in the trial court. Petitioners were the plaintiffs; respondents were the defendants.

STATEMENT OF THE CASE

Procedural Posture

This petition is brought from an opinion of the federal Court of Appeals affirming in part and reversing in part a final summary judgment of the district court which dismissed two counts of a three-count complaint on grounds that the causes of action were precluded by a prior state court judgment.

All of the pertinent facts must be taken from the complaint and the plaintiffs' affidavits, in that the defendants filed no responsive pleadings or affidavits, no discovery was permitted, and no evidentiary hearings were conducted.[1]

Facts

1. *Background*

A resolution passed by the Dade County governing board granted the defendants-developers' request for zoning changes and use variances to permit construction of a stadium and helipad as a first phase of a massive land development project. Hotels and other regional-size commercial developments are part of the planned second phase which has not begun. [R., Vol. 1, Compl., Ex.C]. The subject 434-acre site had been, for a numbers of years, zoned for single family homes development consistent with the surrounding communities. [R., Vol. 1, Compl., p.5]. The residential zoning scheme was protected by a restrictive

[1]There was no determination by the district court that the petitioner's complaint or affidavits were deficient, therefore, for the purpose of deciding res judicata/collateral estoppel issues raised by the unsworn motion to dismiss, all the allegations in the complaint and affidavits must be accepted as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

covenant of record which could be extinguished or modified only on a showing, by the respondents, that a majority of adjacent property owners consented.[2] [R., Vol. 1, Compl., Ex. A]. A majority of the adjacent property owners within 350 feet of the site opposed a release of the covenant. [R., Vol. 1, Compl., p.3; R., Vol. 4, It.42]. A 73,000 seat stadium and helipad were approved for location within 400 feet of petitioners' residential homes [R., Vol. 1, Compl., p.9]; roads to the massive complex around the plaintiffs' neighborhoods are inadequate [R., Vol. 1, Compl., p.9]; the stadium use was approved with a shortage of over 7,000 parking spaces [R. Vol. 1, Compl., p.5]; patrons to the stadium must park in the plaintiffs' neighborhoods [R., Vol. 1, Compl., p.5]; noise levels, light spillage and traffic congestion will destroy the residential character of the communities around the proposed complex. [R., Vol. 1, Compl., p.6]. The zoning changes were granted because the defendants-developers are politically influential. [R., Vol. 1, Compl., p.5].

2. *State proceedings*

The single evidentiary hearing conducted in state tribunals was an administrative zoning hearing. [Tr.] There was no notice to the plaintiffs that Dade County Commissioners would conduct a hearing to decide whether the defendants had secured sufficient consents to extinguish the covenant.

Following the zoning hearing the County Commission enacted a zoning resolution which deleted the restrictive covenant in the exercise of legislative power. [R., Vol. 1, Compl. Ex.B, p.35]. No finding was made by county commissioners that the defendants had secured the necessary majority consents, as required by the covenant, in order to effect a release of the covenant. Neither does the resolution

[2]The covenant release provision is also set out in entirety on page 1362 of the Court of Appeals opinion. [App., p.4]

contain findings of fact or conclusions of law on the allegations of the complaint which challenge the substantive constitutionality of the zoning resolution.

An appeal was taken to a three-judge panel, pursuant to section 33-316, Dade County Ordinance. That appeal is described by the Court of Appeals as the Norwood-Norland I litigation. The state appellate court affirmed the resolution with an opinion. [R., Vol. 1, It.6]. An intermediate state court of appeal, on limited review, denied certiorari with an opinion. [R. Vol. 2, It.2]. That certiorari review is referred to by the Court of Appeal as the Norwood-Norland II litigation.

3. *Federal District Court proceeding*

Count I of the well-pleaded complaint sets forth a claim for unconstitutional impairment of a restrictive covenant by a legislative enactment. [R., Vol. 1, Compl., p.4]. Count II alleged a substantively unconstitutional zoning action. [R., Vol. 1, Compl., p.4]. In paragraph 22 of the complaint the plaintiffs alleged that neither the administrative tribunal, nor state reviewing courts, had addressed the question of the constitutionality of abrogating the covenant by a legislative resolution. [R., Vol. 1, Compl., p.4]. In paragraph 40 of the complaint the plaintiffs alleged that the circuit court, reviewing the resolution by administrative appeal, declined to address the challenge to the substantive constitutional validity of the zoning resolution, holding instead that the question should be raised "in an appropriate action and forum." [R., Vol. 1, Compl., p.6]. In the prayer for relief the plaintiffs asked for a substantial damage award and a trial by jury. [R., Vol. 1, Compl., p.10].

Two of the Defendants, represented by the same attorney, filed an unsworn motion to dismiss on res judicata/collateral estoppel grounds, contending that the constitutional and covenant issues had been decided in the state courts. [R., Vol. 2]. All the other defendants joined in the motion.

The district court gave the plaintiffs notice that the defendants' unsworn motion would be treated as a motion for summary judgment. [R., Vol. 4, It.38]. Within the time permitted by the district court, the plaintiffs filed sworn affidavits in opposition to the defendants' unsworn motion to dismiss. [R. Vol. 4, It.42]. The plaintiffs averred that they were the intended beneficiaries of the restrictive covenant, and that the zoning tribunal, on-the-record, had expressly declined to decide the disputed factual and legal issues related to the restrictive covenant. [R., Vol. 4, It.42]. No counteraffidavits were filed by the defendants. Nevertheless, the district court entered a summary judgment for the defendants holding that both the restrictive covenant claim, and the claim based on an alleged invalidity of the zoning action, were barred by a prior state *trial court* judgment. [R., Vol. 4, It.59].

4. *Rulings of the federal Court of Appeals.*

a. The administrative tribunal was constitutionally infirm.

By implication the Court of Appeals correctly rejected the district court's finding that the issues presented by the complaint had ever been tried in any state court.[3] The federal Court of Appeals focused on the zoning hearing as the sole evidentiary proceeding, holding that it did not afford the plaintiffs-homeowners a fair and full opportunity to litigate.

Most significant is the Court of Appeals's description of the zoning hearing:

> More specifically, there was no quasi-judicial treatment of the release of the restrictive covenant during the hearing . . . Nor is there anything on the record, to indicate that the Board considered the

[3]By its ruling the Court of Appeals found misleading, the allegations in the defendants' unsworn motion that the issues had been adjudicated in a state trial court.

> authenticity of the consents obtained to release the restrictive covenants . . . The record belies appellees' contention that the Commissioners acted in the judicial manner required if a preclusive effect is to be given to administrative action.

Lake Lucerne Civic Assn. v. Dolphin Stadium Corp., 878 F.2d 1360, 1368 (11th Cir. 1989). [App., 14-15].

b. The state court of appeals had original jurisdiction to "adjudicate" disputed issues of fact.

After finding that the original proceeding could not be the basis for applying preclusion principles the Court of Appeals examined the state appellate court opinion and reached a different result. The Court of Appeals concluded, after reviewing the record of the same legislative proceeding where the plaintiffs had no opportunity to litigate, that the state appellate court opinion precluded a federal court trial on count I and part of count II of the complaint.

On the way to its holding that the plaintiffs had a full and fair opportunity to litigate in the state appellate court, the Court of Appeals reasoned that the three-judge state appellate court could, and did "adjudicate"[4] certain restrictive covenant factual issues not decided in the original proceeding. [App. 17]. Further, the Court of Appeals held that the plaintiffs should have "pressed" the appellate court to review the documentary evidence, filed by the defendants in the

[4] "An adjudication implies a hearing by a court, after notice, of level evidence on the factual issue(s) involved. Genzer v. Fillip, 134 S.W.2d 730, 732 (Tex. Civ. App. 1939). An adjudication is the equivalent of a "determination." Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 100 P.2d 124, 132 (1940). Black's Law Dictionary, 39 (5th ed. 1979).

legislative proceeding, for the purpose of making its own findings of fact as to whether certain consent forms filed in the zoning hearing were authentic. [App. 18, n.10].[5]

Further, in affirming the district court's application of res judicata to the claim for impairment of contract rights, the Court of Appeals merged the zoning issue and the separate covenant issue, applying a legislative standard of review to count I of the complaint which is based on a contract. It held that the state appellate court's conclusion, with respect to the restrictive covenant, was unassailable because "the essential requirements of law had been met and that substantial evidence existed to support the zoning action." [p. 1369].

The record of the original proceeding is barren of a judgment, or an administrative order containing findings of fact or conclusions of law on the disputed issues. The transcript of the zoning proceedings is, likewise, totally devoid of competent evidence or factual findings on the issues presented in this federal action. [App. 18].

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[5]None of the material facts on the restrictive covenant issue, described in the state appellate court opinions, and adopted by the federal Court of Appeals, are supported by the transcript or other records of the original proceeding. There is no record support for the statement, as fact, that the developers obtained the consents of a "majority of the owners on a parcel-by-parcel basis." [App.5]. Contrary to the statement on page 1369 of the opinion—"that the circuit and district courts accepted the County Commissioners Construction of the Covenant"—the County Commissioners never construed the covenant, either in the record, or in the subsequently enacted zoning resolution. To the contrary County Commissioners deferred appropriately to the courts for a judicial determination of the legal and factual disputes. [Transcript of zoning hearing, pp. 154-155].

ARGUMENT

I.

A RESTRICTIVE COVENANT FREELY ENTERED INTO BY A PRIVATE LANDOWNER FOR THE BENEFIT OF ADJACENT LANDOWNERS MAY NOT BE ABROGATED BY LEGISLATION.

Neither the state appellate courts or the federal courts addressed the plaintiffs' main argument that the covenant was impermissibly abrogated by the zoning resolution.

The law in Florida, as pronounced by the highest court, is that a restrictive covenant cannot be abrogated by a zoning resolution. *Allen v. Avondale Co.*, 135 Fla. 6, 185 So. 137 (1938). The ruling has been followed by Florida's intermediate appellate courts. *See, e.g., Tolar v. Meyer*, 96 So.2d 554 (Fla. 3d DCA 1957) (restrictive covenant cannot be extinguished by a zoning action); *Staninger v. Jacksonville Expressway Authority*, 182 So.2d 483 (Fla. 1st DCA 1966) (even a zoning change which is a proper exercise of the police power cannot abolish a restrictive covenant). The rationable behind the rule of law is that a restrictive covenant is a contract under Florida law, *Board of Public Instruction v. Town of Bay Harbour Island*, 81 So.2d 637 (Fla. 1955), and a zoning resolution is legislation, *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959). Impairment of a contract by legislation is unconstitutional under state law. Fla. Const., art. I, §10.

Regardless of whether the grant of the defendants' zoning request was a legitimate exercise of police power,[6] the restrictive covenant was unaffected.[7] The opinion of the federal Court of Appeals approving the total extinguishment of a restrictive covenant by a zoning resolution, conflicts with *Allen v. Avondale*, a decision of the Florida court of last resort.

The Contract Clause, United States Constitution, article I, section 10, clause 1, also limits the power of the state to impair contracts between private parties as well as their own contracts. *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). A total destruction of the covenant, by legislation, in order to advance private commercial interests, was unreasonable by standards announced in *United States Trust Co. ov. N.Y. v. New Jersey.*

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[6]Whenever an act of a legislative body, done in the exercise of zoning power, is challenged by appeal the inquiry is limited to the question of power, Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959), citing Angle v. Chicago, St. P., M. & O.R. Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893), or stated otherwise, whether the exercise of the police power furthers a legitimate governmental interest. Albrecht v. State, 444 So.2d 8 (Fla. 1984), citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). A challenge to a zoning action on grounds of a violation of individual constitutional rights, on the other hand, must be by an action for equitable or injunctive relief, or by a suit for damages. Thompson v. City of Miami, 167 So.2d 841 (Fla. 1964). *See also* MacDonald Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (a zoning hearing and an action for declaratory and equitable relief are different).

[7]Disputes arising out of restrictive covenants are contractual matters for resolution by trial courts. *See* Wood v. Dozier, 529 So.2d 1236 (Fla. 1st DCA 1988), *on remand* from Wood v. Dozier, 464 So.2d 1168 (Fla. 1985).

II.

A FEDERAL COURT MAY NOT GIVE RES JUDICATA EFFECT TO A DECISION OF A THREE-JUDGE STATE APPELLATE COURT AFFIRMING A ZONING ACTION, TO BAR A CLAIM BASED ON VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS, WHERE THE FEDERAL APPELLATE COURT FINDS THAT THE PARTIES HAD NO OPPORTUNITY TO LITIGATE CONSTITUTIONAL ISSUES BEFORE THE ZONING TRIBUNAL.

1. *Court of Appeals Decision Conflicts with this Court's Opinions.*

The Court of Appeals' opinion conflicts with this court's opinion in *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). There it was held that a federal court should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim where, on examination of the record, it is clear that the claimant had a full and fair opportunity to litigate in a quasi-judicial administrative proceeding, and where the findings made by the administrative agency on the disputed issues would be entitled to preclusive effect under state law.

It is clear from *Kremer* that where the federal court finds that a state administrative tribunal did not afford the parties a full and fair opportunity to litigate disputed factual issues, and where the administrative tribunal made no determination on the disputed issues, the administrative ruling is constitutionally infirm and an opinion of a state appellate court upholding the administrative decision is not entitled to preclusive effect in state courts, nor preclusive effect or full faith and credit in federal courts. *Kremer* at 456 U.S. 482, 102 S.Ct. 1898.

In *United States v. Utah Const. & Mining Co.*, 384 U.S. 394 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), this court held that a decision of an administrative body will be given res judicata effect only where the "administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate . . ." *U.S. v. Utah Const. & Mining*, 384 U.S. at 422. Further this court suggested, at page 422, that there is a "need [or] justification for a second evidentiary hearing" in order to resolve factual disputes where the parties had no full and fair opportunity to present their version of the facts in the administrative proceeding, or had no opportunity to seek court review *of adverse findings.*[8]

The Eleventh Circuit relied on *United States v. Utah Const. & Mining*, in reaching a result which is inconsistent with the holding in the case. There is no suggestion in the Supreme Court opinion that appellate review is a satisfactory cure where there was no full and fair opportunity to litigate in the administrative hearing, and where the administrative agency made no findings on the disputed issues of fact.

The zoning resolution would have no preclusive effect in the state court, as to disputed factual issues or the constitutional claims, for additional reasons which are stated in the remaining arguments.

2. *Court of Appeals Decision is Contrary to Law of State Highest Court*

In resolving the preclusion issue on the basis of state appellate court opinions—to the exclusion of the record of the original proceeding—the Court of Appeals decision conflicts with the law as pronounced by the state court of last resort.

In *de Cancino v. Eastern Airlines, Inc.*, 283 So.2d 97, 99 (Fla. 1973), the Florida Supreme Court recognized that in

[8]The administrative tribunal, in this case, made no findings on any issues of fact or law.

order for res judicata principles to apply, a judgment must have been entered in the prior proceeding. Further, the state high court held that the judgment alone was not sufficient:

> [G]enerally, the effect of a judgment as res judicata must be determined from the entire record of the case, and not just from the judgment itself.

In *Huddleston v. Graham*, 73 Fla. 350, 74 So. 414 (1917), the Florida Supreme Court held that in deciding whether a cause has been previously adjudicated the court must examine the record of, and the judgment or decree entered in, the *original proceeding*. A prerequisite to any consideration of preclusion, is a judgment or administrative order, neither of which, in this case, emanated from the original state court proceeding. As the Court of Appeals noted, the record of the original proceeding would not justify the application of preclusion principles.

Since there was no judgment entered in the original proceeding, and the record reflects that the original proceeding was only legislative in nature with no findings of fact or conclusions of law on the disputed issues, under Florida law the appellate court opinion affirming the zoning resolution was entitled to no preclusive effect in this federal suit based on violations of constitutionally-protected, individual property rights.

3. *Court of Appeals Decision Conflicts with Decision of Other Circuits on Res Judicata/Collateral Estoppel.*

The holding of the Court of Appeals, that res judicata/collateral estoppel principles apply to appellate court decisions, even where the parties had no opportunity to litigate in the original proceeding, is contrary to the decision of courts of appeal in other circuits.

In *United States v. Cala*, 521 F.2d 605 (2d Cir. 1975), the second circuit held that a court called upon to decide whether issues raised in a proceeding were resolved in a prior

proceeding, must examine the record, pleadings and evidence from the earlier proceeding. The record, pleadings, and evidence are features, exclusively, of original evidentiary hearings.

In *Anderson v. Babb*, 632 F.2d 300, n.3, (4th Cir. 1980), the fourth circuit also held that res judicata, particularly its collateral estoppel branch, is not an inexorable rule, and that a court asked to give collateral estoppel effect to the prior determination of an issue by another judicial tribunal is entitled to scrutinize the nature of the original tribunal and the course of the proceedings to ensure that the traditional guarantees justifying the application of the principle are present. The inquiry, on scrutiny of the prior tribunal which issued the judgment relied upon for preclusion, is whether the original tribunal afforded the federal plaintiff a full and fair opportunity to litigate[9] the federal constitutional claim. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 262 (1980).

The state appellate court was not an original proceeding where federal constitutional claims, not litigated in the zoning hearing, could have been adjudicated.[10]

4. *Due Process and Right to Jury Trial Denied.*

The effect of applying a legislative standard of review to the contract dispute is four-fold: (1) it shifted to the plaintiffs-homeowners, after the zoning hearing, and contrary to the

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[9]Litigate means to bring on for a trial by a complaint or petition, and to have the issues decided on the evidence presented or stipulated to. Valley Express, Inc. v. United States, 264 F.Supp. 1006, 1009 (D.C. Wisc. 1966); Black's Law Dictionary, 841 (5th ed. 1979).

[10]Florida appellate courts reviewing a zoning resolution have no jurisdiction to conduct *de novo* evidentiary hearings. The right to a trial *de novo*, previously authorized by section 163.250, Florida Statutes (1983), was abolished July 1, 1985, prior to the September 1985 zoning hearing. Chap. 85-55, § 19, *Laws of Florida* (1985); Zoning Board of Monroe County v. Hood, 484 So.2d 1331, n.1 (Fla. 3d DCA 1986).

terms of the contract, the burden of going forward with the evidence, (2) it relieved the developers-defendants of their burden to prove a release of the covenant by a preponderance of the evidence as required in civil cases under Florida law, *Lawton v. State*, 13 So.2d 211 (Fla. 1943), and armed them instead with a presumption of correctness, without proof, which attaches only to legislative enactments, (3) it deprived the plaintiffs of a constitutional right to a trial by jury in violation of the Seventh Amendment to the United States Constitution, *Simler v. Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (on certiorari review), and (4) it denied the plaintiffs prior notice and a full and fair opportunity to be heard on the contract claim, in violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963) (on certiorari review).

III.
A FLORIDA APPELLATE COURT REVIEWING A ZONING PROCEEDING HAS NO JURISDICTION TO MAKE ITS OWN FINDINGS OF FACT ON DISPUTED LEGAL ISSUES.

Fundamental principles of appellate review, as announced by the Florida Supreme Court, are (1) an appeal is not an evidentiary hearing, *Tyson v. Aikman*, 31 So.2d 272 (Fla. 1947), (2) an appellate court reviewing an action of an administrative body is restricted to deciding whether factual findings and legal conclusions, *as made by the administrative tribunal*, are supported by the record and the law. *Ryder Truck Lines, Inc. v. King*, 155 So.2d 540 (Fla. 1963), citing *State of Florida v. United States*, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931). (e.s.) It is a "basic concept" that courts reviewing the actions of administrative bodies are not fact-finding tribunals and are limited to vacating administrative orders, insofar as they adjudicate disputed issues, where there

are no findings of fact on those issues. *Wenshaw v. Smith*, 151 So.2d 3 (Fla. 1963).

The federal Court of Appeals' decision, however, has explicitly approved, and given res judicata effect to an appellate court's adjudications and determinations on disputed issues of fact and law, after holding that the original proceeding was not quasi-judicial, that it afforded the parties no full and fair opportunity to litigate, and that it produced no findings of facts on those same disputed issues.

The implicit holding of the Court of Appeals that a state appellate court, reviewing a zoning resolution by administrative appeal, has jurisdiction to delve into the record for the purpose of making its own findings of fact on disputed issues, is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Further, in that the original proceeding was constitutionally infirm for judicial purposes because there was no prior notice, no opportunity to fully and fairly present evidence, and no opportunity to cross-examine witnesses, then the record made of the proceeding could not have bene relied upon by an appellate court for a *de novo* trial on the record.[11] Nevertheless the Court of Appeals, in contradictory fashion, held that the state court of appeals, on the basis of the record made in the constitutionally infirm administrative proceeding, had jurisdiction to adjudicate material factual disputes. The holding is without precedent.

While giving comity to a state appellate court decision, the federal Court of Appeals ignored higher Fourteenth Amendment due process requirements, *Kremer v. Chemical Constr. Corp.*, and has dangerously expanded res judicata/collateral estoppel principles.

[11]In a case involving an administrative appeal pursuant to section 33-316, Dade County Code, an intermediate appellate court held that on review of a zoning resolution the circuit court is limited to "the record as made before that [zoning] agency." Board of County Comm'rs of Met. Dade County v. Lowas, 348 So.2d 13, 17 (Fla. 3d DCA 1977).

CONCLUSION

For the reasons that the Eleventh Circuit opinion constitutes a radical departure from the essential requirements of the substantive and procedural law, the petitioners pray the court issue a writ of certiorari.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail this 27th day of December, 1989, upon those persons shown below:

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APPENDIX

Opinion, Court of Appeals
Eleventh Circuit
August 3, 1988 ..... A

Order Denying Petitions for Rehearing and
Suggestions of Rehearing In Banc
(Filed for Record, October 4, 1988)..... B

LAKE LUCERNE CIVIC ASSOCIATION, INC., et al.,

Plaintiffs–Appellants,

v.

DOLPHIN STADIUM CORP., et al.,

Defendants-Appellees.

No. 88-5383.

United States Court of Appeals,
Eleventh Circuit.

Aug. 3, 1989.

* * *

Florida property owners brought action challenging rezoning of county land for sports stadium complex, claiming that rezoning impaired their contract rights and violated substantive due process and their civil rights. The United States District Court for the Southern District of Florida, No. 87-1546-CIV, Eugene P. Spellman, J., entered summary judgment against property owners, and they appealed. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that: (1) initial state litigation did not preclude instant suit; (2) county zoning hearing did not have preclusive effect; (3) subsequent state litigation precluded impairment of contract and substantive due process claims; (4) taking claim was not precluded; and (5) abstention under *Colorado River* was not appropriate with respect to discrimination claim.

Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN*, Senior District Judge.

KAUFMAN, Senior District Judge.

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*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

The institution of this federal case is the latest round of litigation following a series of state trial and appellate court proceedings related to the construction of a new sports stadium complex in Dade County, Florida. In this federal case, appellants, three individual homeowners and three homeowner associations,[1] assert that their contract rights have been unconstitutionally impaired (Count I), that the applicable zoning resolution of the Board of Commissioners of Dade County was adopted in violation of appellants' substantive due process rights (Count II), and (in Count III) that appellants' "civil rights have been abrogated" by appellee Dade County and by other defendants acting "under color of [state] law" by a stark pattern of discriminatory practices affecting the property and housing rights of black citizens." Appellants seek declaratory and equitable relief, monetary damages, attorney's fees and costs and have prayed a jury trial. Jurisdiction is asserted, and is present, under 28 U.S.C. § 1331 and § 1343.

Appellees are Dade County, Florida, South Florida Regional Council, the Dolphin Stadium Corporation, and individuals and trustees alleged to be developers of the stadium and adjacent commercial enterprises associated with the stadium complex.[2] The district court granted summary judgment for appellees and assessed costs against appellants.

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[1]While neither the court below nor any appellee has questioned the standing of any appellant, this Court notes that that question might be raised as to certain of the corporate appellants. However, because each of the individual appellants possesses standing, and because all appellants are asserting the same grounds for relief, it is not necessary for this Court to inquire concerning the standing of the corporate appellants. *See Carey v. Population Services International*, 431 U.S. 678, 682, 97 S.Ct. 2010, 2014, 52 L.Ed.2d 675 (1977).

[2]Whether appellants have stated, or even have intended to state, each and all of their allegations against each appellee is not clear from the record before us and should be clarified by the district court on remand.

Factual and Procedural Background

The stadium complex includes the home of the Miami Dolphins professional football team plus a commercial and industrial development. It is located on more than 430 acres in an area in northwestern Dade County known as Lake Lucerne. The land for the project was donated, subject to certain rights of reversion, by certain of the individual and/or trustee appellees to the County, which in turn leased it to appellee Dolphin Stadium Corporation.

In 1977, the property, then owned by certain of the appellees, was rezoned from agricultural to single-family and townhouse use. At that time, pursuant to the request of the Dade County Board of County Commissioners, the owners subjected the property to a covenant restricting its commercial use. That covenant included the following provision:

> This Agreement may be modified, amended, or released as to any portion of the land described herein by a written instrument executed by the then-owner of the fee-simple title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the [Metropolitan Dade County Comprehensive Development Master] Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan Dade County, Florida, whichever by law has jurisdiction over such subject matter.

Subsequently, after plans were formulated for what has now become the stadium complex, the developers were apparently unable to obtain the necessary consents to obtain release of the restrictive covenant as to the entire desired area. Therefore, they reduced the area requested for rezoning

by creating a 351 foot setback from two nearby housing developments, thus eliminating the need for consents from the property owners in that setback area. Also, the developers construed the restrictive covenant as assigning to the owner of each parcel of land, including Dade County and the State of Florida, one vote per parcel regardless of how many parcels that person owned. Pursuant to that construction, the developers obtained the consents of the owners of 111 out of a total of 161 parcels in the reduced area—more than a majority vote of the owners on a parcel-by-parcel basis, but the votes of only 18 of the 55 owners of all of the parcels—far short of a majority of such owners.

The "Rolling Oaks" Litigation

In Mildred Harris, et al. v. Dade County, et al. ("*Rolling Oaks I*"), filed December 21, 1984 in the Circuit Court for Dade County, two of the three individual appellants and one of three corporate appellants in this appeal brought suit for equitable and legal relief, seeking to prevent construction of the stadium project. Defendants in that case were all of appellees in this federal action. On August 23, 1985, the circuit court dismissed, with prejudice, four counts of the nine-count complaint, and dismissed the five other counts as premature, with leave to amend. With respect to the dismissals with prejudice, the circuit court concluded that: (1) Count I, in which plaintiffs contended that the gift of public land to a private for-profit development was not a proper public purpose, was without merit because the need for a sports stadium constituted a proper public purpose, even if the stadium was being developed by a private party; (2) Count II, in which plaintiffs alleged lack of proper notice of a public hearing, did not entitle appellants to relief because Dade County had property exercised its discretionary powers and because the notice and hearing requirements did not apply to county land conveyed for the purposes involved; (3) Count III, in which plaintiffs asserted an illegal contract for zoning, did not state a ground for relief because the Dade

County zoning authorities had not contractually obligated themselves to make any zoning change; and (4) Count VIII, in which it was alleged that the law requiring bidding for acquisition of county property had been disregarded, failed to state a cause of action because the applicable law, as was the case with Count II, did not apply to county land conveyed by the County for the specific purpose involved.

With respect to the counts in *Rolling Oaks I* held to be premature and dismissed with leave to amend after final action by the Dade County Board of County Commissioners, the circuit court concluded: (1) Count IV, in which it was contended that appellees were prohibited by the restrictive covenant from making a zoning change, provided no basis for relief because that covenant itself expressly provided for modification, and because "[a]ny judicial determination of the continued viability of the restrictive covenant prior to a final administrative action rezoning the subject property would be unnecessary and premature";[3] (2) Count V, in which it was alleged that the promised rezoning was substantially invalid, was not meritorious because no final action had been taken by the Board of County Commissioners and because administrative remedies in that regard had not been exhausted; (3) Count VI, in which plaintiffs asserted a violation of the law prohibiting the obligation by the County of unapproved funds and the pledging of the County's credit, could not be maintained prior to such expenditure or contract to expend public funds; (4) Count VII, in which plaintiffs claimed that the County violated an industrial revenue bonds statute, did not state a basis for immediate relief because the stadium, as a public project, qualified for the issuance of industrial revenue bonds, and because a suit seeking declaratory judgment concerning the validity of any such bond issue would constitute an advisory opinion; and (5)

[3] *Rolling Oaks I* at p. 13. Copies of the opinions in *Rolling Oaks I* and in *Norwood-Norland I, see infra* at p. 1364, and of Judge Spellman's opinion below are in the record in this case.

Count IX, in which it was urged that the rezoning constituted a taking without just compensation, was prematurely stated pending application of the zoning ordinance to plaintiffs' property.

On appeal, in *Rolling Oaks Homeowner's Ass'n, Inc., et al. v. Dade County, et al.*, 492 So.2d 686 (Fla. 3d D.C.A. 1986) ("*Rolling Oaks II*"), in a per curiam opinion filed June 26, 1986, the District Court of Appeal for the Third District concluded that the five counts dismissed as premature with leave to amend should have instead been dismissed without leave to amend, "allowing the refiling of a new suit if, as and when such alleged causes of action mature." *Id.*, at 688. The district court also held that Count VIII was not prematurely brought and remanded that claim for further consideration by the circuit court. Otherwise, the district court affirmed the circuit court's holdings.[4]

The Zoning Hearing

On September 26, 1985, after the decision in *Rolling Oaks I* and before the decision in *Rolling Oaks II*, a rezoning hearing took place before the Dade County Board of County Commissioners. During that hearing, some of appellants in this appeal, several county officials, certain attorneys, some of whom are of counsel in this appeal, residents and community leaders supporting and opposing the stadium project, and the Reverend Jesse Jackson testified. The restrictive covenant and whether it had been properly released were discussed at length.

The hearing concluded late at night after the Board of County Commissioners passed and adopted a zoning resolution by vote of 7-1, with one commissioners absent, changing the zoning for several plots within the area of the stadium complex from residential to commercial and/or

[4]There is nothing in the record before us to indicate whether there has ever been any further consideration by any Florida court of any issue not determined on a final basis in *Rolling Oaks I* and *II* or of any issue remanded in that litigation by the district court to the circuit court.

industrial use, and designating certain land for stadium use. Promulgated along with that zoning action was a Development of Regional Impact Order relating to air and light and providing for noise and pollution barriers and adequate parking facilities. Compliance with that Order was required before construction of the stadium complex could be commenced.

The "Norwood-Norland" Litigation

Certain of the present appellants and other homeowners and homeowner associations filed an appeal in a Florida circuit court concerning the zoning action. In that case, *Norwood-Norland Homeowners' Ass'n, Inc., et al. v. Dade County, et al.* (*"Norwood-Norland I"*), those plaintiffs challenged the rezoning as an improper deviation from the Dade County Master Plan, and also asserted the wrongful termination of the restrictive covenant by the County Commissioners.

In an opinion filed on August 18, 1986, a three-judge circuit court panel held that the property in question had been designation in the Master Plan as a Sub-Metro Activities Center, and that the building of a sports complex did not constitute a deviation from that Plan. Noting that its function was to "determine whether the zoning changes are a reasonable and appropriate exercise of legislative power, and whether the zoning is fairly debatable," the circuit court concluded that reasonable minds could differ as to whether the resolution bore a "substantial relationship to the public welfare" and upheld the rezoning on that basis.

With respect to the release of the restrictive covenant, the circuit court, with one judge dissenting, determined that the County's construction of the covenant was entitled to great deference and that appellants had failed to meet their burden of showing that the County's construction of the covenant permitting one vote per parcel, and voting by Dade County and the State of Florida, was clearly erroneous.

Thereafter, in *Norwood-Norland Homeowners' Ass'n, Inc., et al. v. Dade County, et al.*, 511 So.2d 1009 (Fla. 3d D.C.A. 1987), *review denied*, 520 So.2d 585 (Fla. 1988) ("*Norwood-Norland II*"), the district court denied a petition for certiorari review of the circuit court's opinion, writing:

> The circuit court is charged with determining whether the agency or municipality accorded procedural due process rights, observed the essential requirements of law, and supported its findings with substantial, competent evidence. It is axiomatic that "zoning or rezoning is the function of the appropriate zoning authority and not the courts . . . ." *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla. 1978). Reviewing courts are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives. Instead, the scope of review is one which recognizes a zoning authority's power to impose reasonable regulations in furtherance of health, safety and community welfare, and to determine, on the evidence before the court, whether the local authority's zoning decision is "fairly debatable." The "fairly debatable" test asks whether reasonable minds could differ as to the outcome of a hearing. If so, the court should sustain a county commission's resolution.
>
> The scope of *this* court's review of a circuit court order rendered in its appellate capacity in an administrative action is even narrower . . . [T]his court's review is limited to determining whether procedural due process was afforded, and whether the correct law was applied. Petitioners are *not* entitled to a second or third full appeal in this court.
>
> However, . . . the standards do not necessarily end here. When, as appears in this case, the zoning authority has approved a use more *intensive* than that proposed by the plan, the decision must be subject to "stricter

> scrutiny" than the "fairly debatable" standard contemplates. Zoning decisions must not only meet the "fairly debatable" standard, but they also should be "consistent" with the comprehensive land use plan.

Id. at 1012 (emphasis in original; certain citations omitted).

Post-Construction Events

On June 18, 1987, after the stadium had been constructed, appellants in this action filed a suit in Dade County Circuit Court, namely, *Lake Lucerne, et al. v. Dade County, et al.*, in which they alleged (1) unconstitutional impairment of contract rights; (2) unlawful gift of public property; (3) unlawful public burden created by a private stadium; (4) substantive unconstitutionality of the zoning resolution; and (5) violation of appellants' civil rights. That action was subsequently—and is still—stayed at the request of appellants pending determination of the issues presented in this federal action now before us.

On August 20, 1987, appellants commenced the instant suit in the United States District Court for the Southern District of Florida, asserting: (1) unconstitutional impairment of contract rights; (2) substantive unconstitutionality of the zoning resolution; and (3) civil rights violations under 42 U.S.C. § 1983, *et al.* In their motions to dismiss treated by Judge Spellman as motions for summary judgment,[5] appellees relied, *inter alia*, upon principles of res judicata, collateral estoppel and abstention.

On March 22, 1988, Judge Spellman granted summary judgment for appellees, holding that Courts I and II were barred by principles of collateral estoppel and/or res judicata, and that as to Count III, principles of res judicata and also of abstention warranted dismissal. Earlier, Judge Spellman

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[5]Judge Spellman, in the court below, appropriately treated appellees' motions to dismiss as motions for summary judgment after giving appropriate notice to the parties that he would so do.

had considered appellants' requests for preliminary injunctive relief because of the alleged failure by Dade County and by Dolphin Stadium Corporation to fulfill their obligations concerning adequate parking and adequate safeguards with regard to light, air, noise and pollution. After a non-evidentiary hearing on August 27, 1987, Judge Spellman deferred determination concerning the preliminary injunction motion and, in effect, consolidated the latter with the merit issues which he disposed of on March 22, 1988. It is from that March 22, 1988 determination that this appeal has been taken.

Preclusion Generally

The District Court determined that the doctrines of both res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, applied to Counts I and II.[6] In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court "made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984). In *Migra*, the Supreme Court held that the same preclusive effect applied to a claim which "a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding," *Id.*, and that pursuant to the Full Faith and Credit Clause of the Constitution, art. IV, § 1, and the federal full faith and credit

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[6] "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect is also referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar." *Migra v. Warren City School District Board of Education*, 465 U.S. at 77 n. 1, 104 S.Ct. at 894 n. 1 (citations omitted). *See also* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402.

statute, 28 U.S.C. § 1738, "[i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Id.* at 81, 104 S.Ct. at 896. *See also Gjellum v. City of Birmingham, Alabama*, 829 F.2d 1056, 1060 (11th Cir. 1987).

Under Florida law,

> [i]t has been well settled . . . that several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the complaint is made. It is also a settled rule that when the second suit is between the same parties, but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it. . . The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.

Albrecht v. State, 444 So.2d 8, 12 (Fla. 1984) (citation omitted). It is in that context that we now examine the preclusive effects of the *Rolling Oaks*, zoning and *Norwood-Norland* proceedings.

Preclusive Effects of the "Rolling Oaks" Litigation

[1] In *Rolling Oaks I* and *II*, direct attacks were made, before rezoning of the Lake Lucerne area, upon the development of the Dolphin stadium complex. In that

litigation, five of the counts were deemed premature; accordingly, they could thereafter be appropriately and timely stated in a subsequent court action.[7]

Preclusive Effects of the Zoning Hearing

[2] Appellees ask us to treat the September 26, 1985 hearing before the Board of County Commissioners of Dade County as a quasi-judicial proceeding and to apply to that Board's decision the preclusive effect of a state court adjudication. In response, appellants characterize rezoning by the Board as legislative in nature and entitled to no preclusive effect because of the lack of the due process trappings required in a judicial-type proceeding. While we agree with the result sought by appellants, our reasoning is slightly different. "Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-60, 16 L.Ed.2d 642 (1966) (footnotes omitted). "When [formality in an administrative hearing] is sufficiently diminished, the administrative decision may not be res judicata. The starting point in drawing the line is the observation that res judicata applies when what the agency does resembles what a trial court does." 4 K. Davis, *Administrative Law Treatise* 52 (2d ed. 1983).

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[7] "In ordinary circumstances a second action on the same claim is not precluded by dismisal of a first action for prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend upon the same precondition." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4437, p. 347.

Florida courts have long recognized and applied in appropriate instances administrative preclusion principles to zoning hearings. *See Coral Reef Nurseries, Inc. v. The Babcock Co.*, 410 So.2d 648, 651-53 (Fla. 3d D.C.A. 1982) (and cases there cited). Under those principles, it is "the character of administrative hearing [which] . . . determines . . . the applicability of the doctrine of administrative res judicata." *Coral Reef*, 410 So.2d at 652. Thus, it is necessary to examine the "procedural due process which is afforded to the interested parties," that is, "the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses." *Id.* A review of the transcript of the hearing of September 26, 1985 reveals that that proceeding fell far short of meeting those judicial-type standards.

From the beginning, the zoning hearing was a rather raucous affair. Because he had to catch a plane, the Reverend Jesse Jackson was the first formally to speak; he strongly opposed the project. He was not questioned by the Commissioners or counsel or anyone else. His testimony resembled a presentation before a congressional committee more than testimony in a court of law. After Reverend Jackson left, county officials and attorneys for persons favoring the Dolphin Stadium project spoke. They were repeatedly interrupted by shouts of residents, which in turn caused the Mayor as the Commission chairman to instruct the residents to quiet down and allow the hearing to proceed in a more orderly fashion. Such participation by the opponents of the project, while undeniably unconstructive, hardly amounted to cross-examination. Also, there was no ordered or directed questioning of the witnesses by the Commissioners or anyone else.

More specifically, there was no quasi-judicial treatment of the release of the restrictive covenant during the hearing. Proponents of the projects explained to the Commissioners how the release had been validly obtained. They were

interrupted by residents in the manner indicated previously, but no discussion of applicable law and facts with reference to the restrictive covenant occurred. Nor is there anything on the record to indicate that the Board considered the authenticity of the consents obtained to release the restrictive covenant.[8] In that regard, it must be emphasized that such failure did not occur because appellants failed to seize the opportunities to explore that issue; rather, it was the structure of the hearing itself which patently failed to provide those opportunities. The record itself belies appellees' contention that the Commissioners acted in the judicial manner required if a preclusive effect is to be given to administrative action. Accordingly, the zoning determinations do not themselves preclude appellants from making their claims in the instant case.

Preclusive Effects of the "Norwood-Norland" Litigation

After the zoning hearing, the *Norwood-Norland* litigation reached first a Florida circuit court and then a Florida district court. That litigation involved a direct appeal from the zoning action. It did not involve a claim of unconstitutional taking without compensation. That latter issue was not raised until the still pending and stayed state court proceeding and this federal case were filed.

In determining the preclusive effect to be given in this case to *Norwood-Norland I* and *II*, our inquiry is not confined to what was presented and pled during those state court proceedings. Rather, we must also examine the scope of the reviewing authority of those state tribunals, for if those state courts lacked jurisdiction to entertain an appeal from the

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[8]Appellees argue that the Commissioners must have assumed that the release was valid when they adopted the rezoning resolution. In this sense, say the appellees, the Commissioners considered the 351 foot setback and the method of apportioning votes as well. Since we conclude that the zoning hearing was not conducted in a sufficiently judicial manner to afford to it preclusive effect, we need not reach those contentions of appellees, though they are hardly overly persuasive.

administrative action an issue presented herein, the determinations of that issue by those state courts cannot have a preclusive effect. "Judicial finality--the predicate for *res judicata*—arises only from a final decision rendered after the parties have been given a reasonable opportunity to litigate a claim before a court of competent jurisdiction." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984), *quoting Kaspar Wire Works, Inc. v. Leco Engineering & Machine*, 575 F.2d 530, 537-38 (5th Cir. 1978) *See Davis v. Dieujuste*, 496 So.2d 806, 808-10 (Fla. 1986); *Estate of Paulk v. Lindamood*, 529 So.2d 1150, 1154 (Fla. 1st D.C.A. 1988). Also, as we consider the issue of preclusive effect of the *Norwood-Norland* litigation, we need to keep in mind the nature of relief sought, i.e., the invalidity of the zoning action and *not* the question of whether the zoning action constituted an uncompensated taking. It is in those contexts that we analyze the specifics of whether and to what extent the *Norwood-Norland* holdings, in and of themselves, preclude the grant of relief sought by appellants in this federal litigation.

Count I—Impairment of Contract Rights

[3] Appellants contend that their contract impairment claim as stated in Count I in this case was not decided in the *Norwood-Norland* litigation because the Florida courts did not determine whether the consents for release of the restrictive covenant were valid and whether the zoning resolution constituted an unconstitutional interference with appellants' contractual rights. That contention may not prevail, since in *Norwood-Norland I* the circuit court considered the Board's resolution and evaluated the substantive legal claims which appellants now again assert, namely, the propriety of the 351-foot setback, the apportionment of votes per parcel rather than per owner, and the rights of Dade County and the State of Florida, as individual owners of parcels, to one vote for each parcel

owned.[9] Because the circuit court did adjudicate those questions, its determinations are entitled to preclusive effect if it had jurisdiction over those issues on appeal from the administrative zoning action.

Under Florida law, "[w]here a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether [in the administrative proceeding] procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law." *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). *See also Norwood-Norland II*, 511 So.2d at 1012.

The purpose of such a restricted scope of review is to guard against the substitution of the judgment of the courts for that of the administrative body in the exercise of the latter's powers, *see Metropolitan Dade County v. Brisker*, 485 So.2d 1349, 1351 (Fla. 3d D.C.A.), *review denied*, 494 So.2d 1151 (Fla. 1986); *Dade County v. Yumbo*, 348 So.2d 392, 394 (Fla. 3d D.C.A.), *cert. denied*, 354 So.2d 988 (Fla. 1977), at least when the administrative action is not arbitrary or discriminatory, and when reasonable minds can differ as to the benefits of the administrative action. Reversal by a Florida court is not warranted simply because, as a reviewing court, it might prefer a different result that that reached by the administrative zoning authority. Nonetheless, Florida

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[9]The circuit court concluded with respect to the 351-foot setback: "It is not controverted . . . that appellees had a right to change the application prior to the rezoning hearing." As to the other contentions, that court wrote that "[t]he construction given by the County in the zoning proceedings should be given great weight," and stated that the appellants failed to meet their burden of showing that the homeowners, and not the developers, were the ultimate intended beneficiaries of the covenant.

law does not call for its courts to rubber-stamp administrative zoning actions, but rather carefully to consider their validity or invalidity. *See, e.g., Gulf Pines Memorial Park v. Oaklawn Memorial*, 361 So.2d 695, 698-99 (Fla. 1978).

In accordance with those principles, the circuit court in *Norwood-Norland I* considered whether the release of the covenant was valid and, in so doing, concluded that essential legal requirements had been met and that substantial evidence existed to support the zoning actions. Also, in the *Norwood-Norland* litigation, the circuit and district courts accepted the County Commissioners' construction of the covenant. Thus, appellants are not entitled to consideration by this court on the merits of the validity of the zoning authority's actions with respect to the restrictive covenant and its release.[10] In that light, we affirm Judge Spellman's application of res judicata to Count I.[11]

Count II—Substantive Unconstitutionality of the Zoning Resolution

Substantive Due Process

[4] Appellants complain in Count II that the rezoning for the stadium development violated the Dade County Comprehensive Land Use Plan and destroyed appellants'

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[10] Appellants contended during oral argument before us that neither the circuit court nor the district court determined in *Norwood-Norland I* or *II* whether the releases were authentic. That is apparently true. However, counsel, during oral argument before us, stated that the circuit court had the boxes of releases before them. Thus, that court could have determined their authenticity if that court had been specifically asked so to do. However, appellants seemingly did not so request. Having not pressed that opportunity in *Norwood-Norland*, appellants cannot so do in this federal litigation.

[11] In the court below, appellants sought partial summary judgment with respect to the claimed violation of the restrictive covenant. That claim may of course not succeed in this case in view of the preclusive effect to which we hold the Florida court's determinations in *Norwood-Norland* are entitled.

expectation of a residential neighborhood. In so doing, appellants seemingly allege denial of substantive due process based upon violation of the Land Use Plan, and also apparently contend that enforcement of the zoning action without appropriate arrangements with respect to air, light, noise, pollution and parking constitutes a taking of appellants' property without just compensation.

"Where property interests are adversely affected by zoning the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns . . . ." *Schad v. Mt. Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981). *See Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980), *cert. denied sub nom. Mark-Garner Assoc., Inc. v. Bensalem Township*, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981) ("The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest."). See also Shelton v. City of College Station, 780 F.2d 475, 482-83 (5th Cir. en banc), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986). In *Norwood-Norland I*, the circuit court explicitly noted that construction of a sports stadium was a legitimate public purpose under Florida law, and that it comported with the Land Use Plan. The district court, in review of the circuit court, wrote that "[w]hen . . . the zoning authority has approved a use more *intensive* that that proposed by the plan, the decision must be subject to 'stricter scrutiny' than the 'fairly debatable' standard contemplates. Zoning decisions must not only meet the 'fairly debatable' standard, but they also should be 'consistent' with the comprehensive land use plan." *Norwood-Norland II*, 511 So.2d at 1012 (emphasis in original). Under that "strict scrutiny" standard of review, the district court affirmed the circuit court's determination of the existence of a legitimate public purpose under state

law. Thus, because the Florida state courts have addressed appellants' substantive due process concerns, appellants are precluded from relitigating those questions in this federal action.

Taking

[5] That brings us to appellants' taking claim. "Although a zoning ordinance or other law comports with the requirements of substantive due process, it nonetheless may violate the 'taking' clause of the Fifth Amendment that is applicable to the states through the Fourteenth Amendment. Thus, if an otherwise valid law severely diminishes the value or impairs the use of a parcel of land, the state or local government may be constitutionally obligated to compensate the owner." *Rogin*, 616 F.2d at 690 (footnotes omitted).

In *Albrecht v. State, supra*, certain landowners, after exhausting the state administrative process, unsuccessfully filed a petition against the Department of Environmental Regulation of Florida in a Florida District Court of Appeal challenging the facial validity of a Florida statute under which that Department had denied a dredge and fill permit on the land involved. The Supreme Court of Florida refused to grant certiorari review. The landowners then brought a new suit in a Florida circuit court, alleging an unconstitutional taking without compensation and seeking compensation for inverse condemnation. In the new case, writing for a unanimous court, Justice Adkins noted that "a claim of uncompensated taking constitutes a separate and distinct cause of action from that litigated previously." *Id. at 12. The first involved a challenge to "the propriety of the agency's action," while the second related to a claim of taking without compensation. Id.* Justice Adkins stated that "the

[12]*See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Schad*, 452 U.S. at 68, 101 S.Ct. at 2182; *Developments in the Law—Zoning*, 91 Harv.L.Rev. 1427, 1462 (1978).

standards necessary for exercise of the police power" may be met, but nevertheless may "result in a taking," and that "the propriety of the agency action must be finally determined before a claim of inverse condemnation exists." *Id.* Justice Adkins concluded that "the doctrine of res judicata [had been] improperly applied" by the circuit court and stated:

> Permitting the petitioners to bring their claim in circuit court does not conflict with out decision in *Key Haven* [427 So.2d 153 (Fla. 1982)]. In that case we provided alternative methods of bringing a claim of inverse condemnation once all executive branch review of the action has been completed. Direct review in the district court of the agency action *may* be eliminated and proceedings properly commenced in circuit court *if* the aggrieved party accepts the agency action as proper. *Key Haven*, 427 So.2d at 159. The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists. In *Key Haven* we merely provided an alternative to direct review for those parties who wish to accept the propriety of the action. This was not meant to extinguish the property owner's right to bring the separate claim of inverse condemnation in circuit court at the conclusion of all judicial as well as executive branch appeals regarding propriety of the action. Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. We emphasized that once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper. *Id.* at 160. This is not to say that once a party chooses to litigate the propriety of the action through the district court that it is estopped from bringing a claim of inverse condemnation in circuit court.

Id. at 12-13.

In *Dade County v. National Bulk Carriers*, 450 So.2d 213 (Fla. 1984), in an opinion filed five months after *Albrecht*, the property owner had been denied a use permit to excavate a lake on its property in order to build, by fill, certain of its land to a higher point of elevation. The zoning commissioner also rezoned the property for preservation purposes. On appeal, the circuit court, in upholding the administrative zoning action, "noted that its opinion should not be construed as a denial of [a landowner's] right to raise the taking issue in a separate action." *Id.* at 215. Writing for the Supreme Court, Justice Adkins remanded, holding that the court below had misconstrued a Florida statute and also because:

> In our recent decisions in *Albrecht v. State*, and *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, we recognized the proposition that under certain circumstances a statute or regulation may meet the standards necessary for an exercise of the police powers and authorize a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 [43 S.Ct. 158, 67 L.Ed. 322] (1922); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 [102 S.Ct. 640, 70 L.Ed.2d 618] (1981). In *Albrecht* we held that a claim of uncompensated taking constitutes a separate and distinct cause of action from an action challenging the propriety of an agency's action in denying a permit to dredge and fill. We recognized that the determination, judicially or otherwise, that such an action was authorized under the applicable statute does not necessarily also determine that there is no taking. We distinguished between a zoning change or denial on the one hand and a permit denial on the other hand in *Key Haven*. We explained that "[a] zoning ordinance is, by definition, *invalid if it is confiscatory*," 427 So.2d at 159, and consequently, no inverse condemnation would be necessary. On the other hand, as in *Key Haven*, if the

> "statute authorizes a permit denial which is confiscatory," *id.*, a separate condemnation proceeding is an appropriate remedy. Under the type of statutory permitting-scheme involved in *Key Haven, Albrecht*, and *Graham v. Estuary*, it was contemplated that its application may result in a taking. Such is not the case in the application of a zoning ordinance. To be valid, it must be reasonable. If a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken. We hold that this cause should be remanded to the circuit court for a determination of whether the county's action is confiscatory and constitutes a taking without just compensation, in which event the action of the board must be stricken. A denial of rezoning cannot be both reasonable and confiscatory.

Id. at 215-16 (certain citations omitted).

Our decision in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987), involved a § 1983 suit for damages for inverse condemnation by Florida zoning action, and required this court to apply *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In *Williamson*,

> the Supreme Court of the United States held that a Section 1983 claim for money damages stemming from a regulatory taking of property in violation of federal constitutional rights is not ripe for review on the merits until the Plaintiff demonstrates, first, that a final decision by the relevant authority regarding application of the regulation to the subject property has been made, i.e., the "initial decision-maker has reached a definitive position on the issue that inflicts an actual, concrete injury," 473 U.S. at 193 [105 S.Ct. at 3120]; and second, that no adequate state remedy, such as inverse condemnation, is available to redress the injury occasioned by the final decision. *Id.* at 196-97 [105 S.Ct. at 3121-22]. the rationale of the Court is that, absent the state's denial to a property

owner of just compensation, there can be no cognizable harm to any federal constitutional right. 473 U.S. at 194 n. 13 [105 S.Ct. at 3120 n. 13]. ("The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").[2]

[2]The appellant in *Williamson County* had challenged the zoning ordinance as invalid on two theories: First, he argued it violated the Fifth Amendment's Just Compensation Clause, as applied to the states through the Fourteenth Amendment; alternatively, he claimed the regulation was a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution. Because the Court found the action was not ripe for review, it did not reach the merits of the appellant's challenges or decide whether a confiscatory zoning regulation—a "taking"—is more appropriately considered a violation of the Due Process or the Just Compensation Clause. Nevertheless, in holding that the claim was premature under either theory, *id.* at 199-201 [105] S.Ct. at 3123—3124], the Supreme Court implicity ruled that the same ripeness test must be applied to both claims.

Corn, 816 F.2d at 1515-16 (certain citations omitted).

In *Corn*, over a period of more than ten years, there were numerous zoning actions and state court decisions affecting the property involved. As in this case, the taking issue had not been decided in any of those proceedings. Accordingly, as did this court in *Corn*, "[w]e note at the outset that there is no issue the first prong of *Williamson County's* ripeness test has been satisfied" and that "[t]he remaining dispute centers on fulfillment of *Williamson County's* second prong: whether, in fact, there exists an available and adequate state remedy to compensate [the landowner] for his loss." *Id.* at 1516. After discussing Florida law as set forth in *National Bulk Carriers, Albrecht* and *Key Haven*, including the absence of an action for inverse condemnation as a remedy when a valid zoning change has occurred and the availability of such an action when a permit denial is involved, this court held in *Corn:*

> In light of the foregoing, we conclude that Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance later declared invalid. We further find no support for the availability of an action for money damages, based either on trespass or violation of the right of due process, as guaranteed by the Florida Constitution.[8] As discussed above, the cited authorities are persuasive that the remedy of invalidation is an exclusive one pursuant to Florida law, because zoning is a function of the police power rather than the exercise of eminent domain.
>
> [8]Article 1, Section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law . . ."

Id. at 1519.

While it is difficult, as it was in *Corn*, to classify the contentions in Count II of the complaint in this case as growing totally out of alleged invalidity of a zoning ordinance rather than something more akin to denial of a permit, on balance, it would appear that we are dealing with more of the former than the latter. Accordingly, we hold that the second prong of *Williamson County* has been satisfied and that appellants, on remand, may pursue under 42 U.S.C. § 1983, their taking claim in this case.

That claim requires determination of whether or not appellants have suffered sufficient diminution of their property rights from the occurrences of which they complain in this case, so as to entitle them to any compensation. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Developments in the Law—Zoning*, 91 Harv.L.Rev. 1427 (1978).[13]

[13]Whether or not, after appropriate discovery opportunity is afforded to the parties, there will remain any triable fact issue with regard to the taking claim will be up to the district court, on remand, to determine.

Count III—Alleged Pattern of Discrimination

[6, 7] In their third count, the individual appellants, who are black residents of the Lake Lucerne area, claim a history of unconstitutional and discriminatory community development by appellee Dade County, and a conspiracy among the County and appellees South Florida Regional Planning Council, Dolphin Stadium Corporation, Joe Robbie, and Morton Properties to further the interests of the developers of the Dolphin Stadium project while ignoring the property rights of appellants. The district court abstained from exercising federal jurisdiction over the claims of appellants, brought pursuant to 42 U.S.C. § 1983, *et al.*, in Count III because of the pending state action, which contained a similar count. In so doing, the district court applied the abstention standards stated by the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-16, 103 S.Ct. 927, 936-37, 74 L.Ed.2d 765 (1983). Appellees rely upon those determinations by Judge Spellman and also contend that appellants' Count III contentions are barred by principles of preclusion. The latter argument may not prevail since appellants' Count III civil rights claims represent different allegations than the attacks in *Rolling Oaks I* and *II* and in *Norwood-Norland I* and *II*. In addition, while there was some discussion of racial discrimination during the zoning hearing, there was not, as discussed *supra*, full and fair opportunity for litigation of that issue at that time.

However, for reasons unrelated to preclusion, the district court abstained from deciding and dismissed Count III because of the pending Lake Lucerne state action. Relying upon the factors articulated by the Supreme Court in *Moses H. Cone*, Judge Spellman concluded that a Florida state court would be the most efficient and appropriate forum for resolution of the civil rights claims.

In *Noonan South, Inc. v. The County of Volusia*, 841 F.2d 380 (11th Cir. 1988), Judge Vance, writing for this court, wrote that in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court had "suggested" that when there is a pending "parallel state court action, . . . federal courts [should] consider a number of factors in determining the appropriateness of dismissal: (1) whether one of the courts has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; . . . (4) the order in which the forums obtained jurisdiction"; and that in *Moses H. Cone*, the Supreme Court had "mentioned two additional factors: (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the parties' rights." *Noonan South*, 841 F.2d at 381. Our application of those factors leads us to disagree with the district court's dismissal of Count III on abstention grounds.

Jurisdiction over property is not implicated in either the stayed state or the instant federal action, and each forum would appear equally convenient for the parties. As to the potential for piecemeal litigation, counsel for appellants, during oral argument before us, specifically stated their desire to move ahead in this federal case and have continued the existing stay in the state action. Accordingly, there is little or no potential for duplicative or simultaneous litigation of the issues raised in Count III in state and federal forums.

Emphasis upon the order in which the forums obtained jurisdiction "does not turn on which complaint was filed first. Instead, it is measured 'in terms of how much progress has been made in the two actions.' " *Noonan South*, 841 F.2d at 382, *quoting Moses H. Cone*, 460 U.S. at 21, 103 S.Ct. at 940. In the instant case, the record indicates that there has been little activity in the state court case and that there will be little or none prior to resolution of the issues being remanded to the federal district court pursuant to this opinion.

As for the final two factors added by the Supreme Court in *Moses H. Cone*, whether the civil rights issues raised in Count III are determined in state or federal court, federal law will govern their adjudication. While, like the district court, we are convinced that "[t]here is absolutely no reason why the courts of the state of Florida are any less competent than [a federal] Court to adjudicate the civil rights claim at issue,"[14] the sixth "factor will only weigh in favor or against dismissal when one of the forum is *inadequate* to protect a party's rights." *Noonan South*, 841 F.2d at 383.

In short, since "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244, since "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention," *Noonan South*, 841 F.2d at 381, *quoting Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246, and since appellants have indicated by their actions their desire to pursue their federal civil rights claim in federal court only, we reverse the district court's dismissal of Count III and remand appellants' contentions in Count III, as well as appellants' taking claim in Count II, for further appropriate proceedings in the federal district court.[15]

AFFIRMED in part; REVERSED in part; and REMANDED for further proceedings consistent with this opinion.[16]

[14]Judge Spellman's opinion at p. 5.

[15]After oral argument, some of appellees filed a Motion to Dismiss Because of Lack of Subject Matter Jurisdiction. Appellants responded with a Motion to Strike and Motion for Sanctions. Both motions are denied. In this appeal, review is not sought of state court judgments; rather, appellants seek reversal, *inter alia*, of the district court's application of preclusion principles. Appellees' argument is misplaced. However, we do not find it to be frivolous. *See Hollins v. Wessel*, 819 F.2d 1073, 1074 (11th Cir.1987).

[16]On remand, the district courts' assessment of costs upon appellants should be considered anew.

[FILED OCTOBER 4, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH COURT

No. 88-5383

LAKE LUCERNE CIVIC
ASSOCIATION, INC., et al.

Plaintiffs-Appellants,

versus

DOLPHIN STADIUM CORP., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC**

(Opinion August 3, 1989, 11 Cir., 198____, ____ F.2d____).

Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

No. 89-1062

Supreme Court, U.S.
FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., ROLLING OAKS HOMEOWNERS' ASSN., INC.; MILDRED HARRIS; BARRY YOUNG; and NORINE FLETCHER,

Petitioners,

vs.

DOLPHIN STADIUM CORP., a Florida corporation; JOSEPH ROBBIE; DADE COUNTY, a political subdivision of the State of Florida; LAWRENCE MORTON, EMIL MORTON, individually and as Trustees, LOTTIE MORTON, individually and as Trustee, ALAN MORTON, and MAX BODERMAN, d/b/a MORTON PROPERTIES; SOUTH FLORIDA REGIONAL PLANNING COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

DID THE FEDERAL APPEALS COURT LACK JURISDICTION TO REVIEW AND REVERSE STATE COURTS ON MATTERS EITHER EXPRESSLY ADJUDICATED BY THE STATE COURTS OR INEXTRICABLY INTERTWINED WITH SUCH ADJUDICATIONS?

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TREATISE:

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No. 89-1062

In The

Supreme Court of the United States

October Term, 1989

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., ROLLING OAKS HOMEOWNERS' ASSN., INC.; MILDRED HARRIS; BARRY YOUNG; and NORINE FLETCHER,

Petitioners,

vs.

DOLPHIN STADIUM CORP., a Florida corporation; JOSEPH ROBBIE; DADE COUNTY, a political subdivision of the State of Florida; LAWRENCE MORTON, EMIL MORTON, individually and as Trustees, LOTTIE MORTON, individually and as Trustee, ALAN MORTON, and MAX BODERMAN, d/b/a MORTON PROPERTIES; SOUTH FLORIDA REGIONAL PLANNING COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Dade County, a political subdivision of the State of Florida; Dolphin Stadium Corp.; Joseph Robbie (deceased); Lawrence Morton and Emil Morton, individually and as Trustees; Lottie Morton, individually and as Trustee; Alan Morton; Max Boderman, d/b/a Morton Properties; and South Florida Regional Planning Council; (hereinafter referred to collectively as

"Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 878 F.2d 1560 (11th Cir. 1989).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 878 F.2d 1360, and is reprinted in the Appendix hereto (hereinafter cited as "App." followed by item number)[1] at Item 1A.

The Memorandum Decision of the United States District Court for the Southern District of Florida (Spellman, D.J.) has not been reported. It is reprinted at App. 2A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Art. IV, Sec. 1 (Full Faith and Credit).

2. 28 U.S.C. § 1738 (Full Faith and Credit).

The full text of the foregoing is included in the Appendix.

INTRODUCTION

Respondents have filed a separate petition seeking review of holdings contained in the Eleventh Circuit's

[1] Pages from the official reported decisions have been interdelineated in the appendix for convenience.

opinion and not challenged in this cause. *See Dade County, et al. v. Lake Lucerne Civic Ass'n, Inc., et al.*, No. 89-1050, hereinafter "Dade County Petition". Here, Petitioners rely upon aspects of the Eleventh Circuit's opinion that have been shown by the Dade County Petition to be in error because of conflict with prior Supreme Court decisions. In particular, Petitioners assert that the Eleventh Circuit Court of Appeals should have reviewed and reversed Florida courts on matters either expressly adjudicated or inextricably intertwined with state court adjudications. Thus, the instant Petition seeks to compound errors already committed by the Eleventh Circuit below.

STATEMENT OF THE CASE

This statement is presented because of substantial errors in and omissions from Petitioners' Statement of the Case. Supreme Court Rule 34.2.

Overview

The history of facts and state court litigation, recounted in the opinion of the Eleventh Circuit Court of Appeals below,[2] (hereinafter "Opinion" or "Op.", App. 1) is reduced to its essence as follows.[3]

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[2] *Lake Lucerne Civic Ass'n. Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360 (11th Cir. 1989).

[3] Pursuant to Supreme Court Rule 19.1 Respondents have not yet requested certification of the record before the circuit court. Nevertheless, statements herein are supported by references to the record utilizing "R" followed by designations originating with the district court clerk. "T" refers to the transcript of the Dade County Commission hearing at R. Vol. I. It. 22 Exh. 1. Other abbreviations are consistent with those listed by Petitioners.

On October 26, 1985, the Board of County Commissioners of Dade County conducted an extensive seven-hour evidentiary public hearing to consider an application for zoning relief pertaining to a 432 acre tract where the stadium was proposed to be built. After hearing extensive testimony from both those supporting and opposing the application, the Commission approved, *inter alia*,[4] the above-described zoning. Both before and after the zoning approval, Petitioners initiated and prosecuted two challenges all the way to the Florida Supreme Court, which denied review. The pre-approval suit culminated in *Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County*, 492 So.2d 686 (Fla. 3d DCA 1986), *rev. denied*, 503 So.2d 328 (Fla. 1987). The post-approval state litigation (hereinafter "zoning appeal") was taken first to the circuit court appellate division, then to the Third District Court of appeal, and finally to the Florida Supreme Court. *Norwood-Norland Homeowners' Ass'n, Inc. v. Dade County*, 511 So.2d 1009 (Fla. 3d DCA 1987), *rev. denied*, 520 So.2d 585 (Fla. 1988).[5]

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[4] In addition to the stadium, the approval included other transitional type uses such as low intensity, low-rise office park uses and a neighborhood park buffer to be maintained at the sole expense of the zoning applicants. *See* County's Answer Brief below, p. 12-14 and Op. 1362.

[5] The pre-approval litigation was designated by the Eleventh Circuit as "Rolling Oaks I," and "Rolling Oaks II," and the zoning appeal was described by the appellate court as "Norwood-Norland I" and "Norwood-Norland II", op. at 1363-1365. These designations are sometimes used in this Response.

A three-judge circuit court appellate panel affirmed the zoning approval, after which Petitioners, homeowners' associations and property owners, petitioned the Third District Court of Appeal for a writ of certiorari. The Third District issued a detailed opinion which expressly held, *inter alia*, that: (1) the zoning was valid; (2) the covenant had been properly released according to its own terms; and (3) the County Commission's zoning hearing had afforded procedural due process to Petitioners. The state court's opinion was necessarily predicated upon there being no violation of constitutional rights because under Florida law such a constitutional infirmity would have required that the zoning be nullified.[6] Significantly, at no time during the state litigation they commenced, did Petitioners announce any reservation of issues for federal court adjudication.[7]

After their petition for certiorari to the Florida Supreme Court was denied, Petitioners elected *not* to seek review in the United States Supreme Court. Instead, they filed a civil rights action in the United States District Court for the Southern District of Florida, seeking damages resulting from the *same* County zoning approval that had been upheld by the Florida courts. The federal complaint was based on the same underlying contentions which have been adjudicated by the Florida courts.

Petitioners' asserted basis of federal jurisdiction was a civil rights claim under 42 U.S.C. §1983, *et seq.* and 28

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[6] See discussion at p. 17, n.24, and accompanying text.

[7] See *England v. Louisiana State Board of Medical Examiners*, 374 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

U.S.C. §1331 (federal questions) and §1343 (civil rights) predicated upon alleged impairment of contract rights (Count I), substantive invalidity of zoning (Count II), and discrimination (Count III).[8] Petitioners moved to dismiss on the basis of *res judicata*, collateral estoppel and abstention, among other grounds. Upon notice, the district court treated Respondents' Motions to Dismiss as Motions for Summary Judgment, and entered a summary adjudication that Counts I and II were barred by principles of collateral estoppel and/or *res judicata*, and that Count III should also be dismissed.[9]

Petitioners appealed the district court's order to the Eleventh Circuit Court of Appeals.[10] The three judge panel of the Eleventh Circuit[11] upheld in part the district court's dismissal based upon preclusion of substantive

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[8] The Eleventh Circuit later inferred that Count II of the complaint "also apparently" sought damages for a "taking" without just compensation, although a taking, as such, was not alleged. Op. at 1369.

[9] The Eleventh Circuit characterized the dismissal of Count III as based on both *res judicata* and abstention. Op. at 1365. Petitioners have contended throughout this litigation that Count III was barred by preclusion principles. *See* Op. at 1373.

[10] After it became clear at oral argument that Respondents were asking the circuit court to reverse express state court adjudications, Dade County, joined by the other Petitioners, filed a motion to dismiss the appeal for lack of subject matter jurisdiction. Although found not to be frivolous, the motion was denied. Op. at 1374 n.15.

[11] The opinion was authored by the Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation. Op. at 1361-62.

due process (zoning validity) and impairment of contract (release of covenant) claims. The court reversed the district court as to the taking and discrimination claims (Counts II and III, respectively), a matter addressed in the Dade County petition but not the petition at bar. The Eleventh Circuit also affirmed the district court's summary judgment procedure, Op. 1365, n.5, and neither that procedure nor its affirmance have been put in issue by Petitioners.[12]

Throughout their Statement of the Case, Petitioners misadvise the court that unsworn allegations of the complaint in the district court "must be accepted as true," (P.4, n.1)[13] because Respondents filed *no sworn* motion or affidavit in the summary judgment proceedings before the district court. P.4, ¶2, n.1, P.6, last paragraph, P.7, ¶1. In fact, Respondents did file, and the record contains, an affidavit incorporating approximately five pounds of documents *sworn* to be:

> "true and correct copies of [certain] original pleadings, briefs and court decisions in the numerous [state court] actions commenced by Plaintiffs herein against Dolphin Stadium Corporation and the other defendants relating to the new sports stadium . . . "

R.Vol.II, It. 13, Exh. 1, et seq. See also R.Vol.I, It. 22.

While the documents filed with the district court are primarily pleadings of Petitioners, the affidavit goes on to advise that "voluminous and extensive responses in opposition in the respective courts," were filed by

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[12] See Supreme Court Rule 21.1(a), *Irvine v. California*, 347 U.S. 128, 129, 74 S.Ct. 381, 98 L.Ed. 561 (1954).

[13] Unless the context otherwise indicates "P" refers to the petition.

Respondents. Petitioners filed no counter-affidavits contesting the authenticity of the state court items filed by Respondents. To the contrary, they acknowledged the genuineness of these documents by their repeated reference thereto both before the district court and the Eleventh Circuit.

The following account of State and lower federal court proceedings is based upon the aforementioned sworn, and admittedly authentic, documentation rather than upon Petitioners' unsworn complaint, upon which the Petition is predicated.

Release of Restrictive Covenant

Petitioners' statement concerning a lack of notice of the proposed release of the restrictive covenant, P.5, is not factual.[14] Here the County's notice and hearing procedure, a matter of public record well known to all parties, was followed. The matter was expressly included within the application before the County Commission at its lengthy hearing. R.Vol.I, It. 22, Exh. 2, p.2 at ¶22. The Code required newspaper publication of the hearing on the release of covenant issue and further provided for

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[14] The restrictive covenant had been required as a condition of a prior (1977) zoning resolution. Section 33-311(h)(j)(1) and 33-314, Code of Metropolitan Dade County, Florida (hereinafter referred to as "Code").

both mailed notice to surrounding property owners and the physical posting of a sign on the property in question.[15] Finally, through a public reading of portions of the advertisement at the outset of the 7-hour zoning hearing, it was again formally announced that the release of covenant issue would be determined at that hearing. T.10.

Petitioners had actual knowledge of what the hearing would resolve. Prior to the County Commission hearing, Petitioners' attorneys had approached the Dade County Attorney with regard to the county's official interpretation of the covenant and the legal methodology for its release. T.211-12. Petitioners benefitted from at least one highly favorable opinion as to what consents would be considered valid. Other county officials were also available to Petitioners and their counsel to apprise them of the running tabulation of the consents and revocation of consents. *Id.*

Petitioners' Statement to this Court that the zoning hearing was "totally devoid of competent evidence or factual findings on the [restrictive covenant] issues" P.9, is also not factual. As observed by the Eleventh Circuit, "[t]he restrictive covenant and whether it had been properly released were discussed at length" during the zoning hearing. Op. 1364.[16] The record of that hearing

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[15] Sections 33-310, 313 and 315, Dade County Code.

[16] The covenant provides in pertinent part:

This Agreement may be modified, amended, or released as to any portion of the land described

(Continued on following page)

includes the finding by the Executive Council of the County's Developmental Impact Committee[17] that sufficient consents had been obtained under the provisions of the covenant for the County Commission to consider release thereof. R.Vol.I, It. 22, Exh.2, p.4, ¶3. The voluminous original consents to release of the covenant were also physically present before the County Commission and were addressed and analyzed at length by counsel for some of the parties. T.132-140.

During the hearing an Assistant County Manager was asked by the commission to do a recount "on the spot." This recount at the hearing, done under oath and subject to cross-examination if requested, unequivocally showed a majority of consents to exist. T.164.

(Continued from previous page)

> herein by a written instrument executed by the then-owner of the fee-simple title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the [Metropolitan Dade County Comprehensive Development Master] Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan Dade County, Florida, whichever by law has jurisdiction over such subject matter.

Lake Lucerne Civic Ass'n, et al. v. Dolphin Stadium Corp., et al., 878 F.2d 1360, 1362 (11th Cir. 1989) (quoting release provision of subject restrictive covenant).

[17] Section 33-303.1, Dade County Code.

At the time of taking its vote, the County Commission had before it: (1) the affirmative findings of the Developmental Impact Committee (DIC); (2) the physical consents; (3) the oral analysis and presentation of those counsel who elected to address the issue; and (4) the contemporaneous recount and testimony under oath of the Assistant County Manager. The County Commission's motion to approve the zoning application made express reference to the DIC report, which contained a finding of a majority of consents, T.263, and the County Commission's written resolution expressly "resolved that the requested deletion of a covenant governing land development . . . be and the same is hereby approved. . . ." Page 837 of state appellate record, Exh. B to Exh. 10 of R.Vol.II, It. 13.

Petitioners neither presented nor proffered counter evidence pertaining to the covenants at the Commission hearing, nor did they attempt to cross-examine the sworn testimony as to the physical count. The record before the County Commission contains absolutely nothing to suggest that Petitioners were denied either notice or a full opportunity to make any presentation they desired on the issue. The Florida Third District Court of Appeal expressly held: *"Neither do we find any denial of petitioners' procedural due process rights in any of the proceedings leading up to the County Commission's adopting of the zoning resolution."*[18]

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[18] *Norwood-Norland II*, Petitioners' zoning appeal, 511 So.2d at 1013 (emphasis supplied).

Notwithstanding Petitioners' assertion that the Eleventh Circuit found the Florida Appellate court to have adjudicated unresolved factual issues, P.8, citing Petitioners' App.17, the Eleventh Circuit merely found the state courts to have properly applied the correct standard of review. Petitioners' App. p.15-16, Op. 1368-69. Conspicuously absent from the Petition is any mention of the following adjudication of the Florida Third District Court of Appeal: "[W]e will not disturb the circuit court's decision to uphold *the Commission's finding of a majority vote* [of consents] authorizing release of the covenant."[19]

Substantive Validity of Zoning

Petitioners' Statement that State courts did not address the substantive constitutional validity of the zoning, P.6, is again not factual. The adjudication of this issue by the State courts is detailed in part at Op. 1368-1369. *See also* County's Answer Brief filed with the Eleventh Circuit at 8-12.[20] Petitioners also erroneously imply that the state courts applied a deferential standard of review to a merged zoning-contract issue. P.9. In fact such a standard was not even applied to the zoning issue as the Florida Third District applied a standard of " 'stricter scrutiny than the [deferential] 'fairly debatable' standard contemplates."[21]

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[19] 511 So.2d at 1014.

[20] This analysis shows that all issues were considered by the Florida courts except when Petitioners led the state circuit court to believe that certain issues were not germane to the zoning appeal. *See also* Dade County Petition to the Supreme Court in case number 89-1050 at p.20, n.17 and accompanying text.

[21] *Norwood-Norland II*, 511 So.2d at 1012.

REASONS FOR DENYING THE WRIT

THE FEDERAL APPEALS COURT LACKED JURISDICTION TO REVIEW AND REVERSE STATE COURTS ON MATTERS EITHER EXPRESSLY ADJUDICATED BY THE STATE COURTS OR INEXTRICABLY INTERTWINED WITH SUCH ADJUDICATIONS.

A. Introduction

The Eleventh Circuit properly afforded full faith and credit to the Florida appellate courts' adjudications upholding the zoning and release of covenant in Petitioners' state zoning appeal. The appellate court, however, had no jurisdiction to reverse the state appellate courts on other matters either expressly adjudicated or inextricably intertwined with adjudications of the Florida courts. The Petition at bar is predicated almost exclusively on just such an improper exercise of jurisdiction – the Eleventh Circuit's readjudication of the procedural due process issue already decided by the state appellate courts. The Petition asks this Court to compound the Eleventh Circuit's error by extending it further than even the appellate court deemed appropriate, i.e., to reverse the state courts on the substantive issues of release of the restrictive covenant and constitutionality of the zoning.

The Petition at bar is not only predicated upon the compounding of Eleventh Circuit error, but is devoid of any showing that the matters complained of are of import beyond the confines of this particular case. This is in sharp contrast to the Dade County Petition, which demonstrates that the unauthorized extension of lower federal court jurisdiction to review and reverse state court adjudications creates widespread uncertainty and

financial risk for local governments nationwide, renders useless the labors of state courts, and increases the caseload of the lower federal courts.

1. Procedural Due Process

Contrary to Petitioners' contention, the Eleventh Circuit's recognition that Florida *court adjudications* have preclusive effect in the lower federal courts is neither in conflict with *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262, *reh'g denied*, 103 S.Ct. 20, 73 L.Ed.2d 1405 (1982) (emphasis supplied), nor other Supreme Court decisions. *Kremer* "decide[d] whether a federal court in a Title VII case should give preclusive effect to a decision of a State *court* upholding a State administrative agency's rejection of an employment discrimination claim . . .". 456 U.S. at 463, 102 S.Ct. at 1888, 72 L.Ed.2d at 268 (emphasis supplied). The court observed that application of the principles of *res judicata* and collateral estoppel require that such state proceedings "need do no more than satisfy the *minimum procedural requirements*" of due process 456 U.S. at 481, 102 S.Ct. at 1897, 72 L.Ed.2d at 280 (emphasis supplied).

Petitioners argue that a purported denial of procedural due process before the County Commission, and not the courts, defeats the application of the federal full faith and credit mandate to the state *court* adjudications in Petitioners' zoning appeals. This argument is erroneous for several reasons.

First, Petitioners overlook the following essential matter of fact and law which distinguishes this cause from *Kremer* as well as any other case cited in the Petition:

> *The Florida appellate courts have already expressly adjudicated that there was no "denial of Petitioners' due process rights in any of the proceedings leading up to the County Commission's adoption of the zoning resolution."*

Norwood-Norland II, 511 So.2d at 1013. Neither *Kremer* nor any other U.S. Supreme Court case authorizes the lower federal courts to readjudicate the issue of procedural due process *where the federal court plaintiff previously initiated state court litigation and obtained therein an adverse adjudication of the identical procedural due process issue.*

In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the United States Supreme Court held:

> "They [lower federal courts] *do not have jurisdiction*, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings *even if those challenges allege that the state court's action was unconstitutional.* Review of those decisions may be had only in this Court."

460 U.S. at 486, 103 S.Ct. at 1317, 75 L.Ed.2d at 225 (emphasis added); *See also* the full faith and credit clauses of the federal constitution, art. IV, § 1, and statute 28 U.S.C. § 1738. App. 4A.

When the administrative due process issue itself has once been adjudicated by a state court, *Feldman* prohibits any exercise of jurisdiction by lower federal courts because they *"lack subject matter jurisdiction over [the] complaints."* 460 U.S. at 482, 103 S.Ct. at 1315, 75 L.Ed.2d at 222 (emphasis supplied). The *Feldman* rule is unconditional in that " 'lower federal courts possess *no power*

whatever to sit in direct review of State court decisions.' "[22] This rule extends not only to express adjudications but also to all constitutional and other claims "inextricably intertwined" with such decisions. 460 U.S. at 482, 103 S.Ct. at 1303, n.16, 75 L.Ed.2d at 223.[23]

Kremer is also inapplicable to the cause at bar because, although the Eleventh Circuit declined to afford

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[22] 460 U.S. at 482, 103 S.Ct. at 1303, 75 L.Ed.2d at 223, n.16 (emphasis supplied), quoting from *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 296, 26 L.Ed.2d 234, 90 S.Ct. 1739 (1970).

[23] The United States Supreme Court first prohibited a district court from reviewing a state court decision for alleged federal errors in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The Supreme Court found such review improper for two principal reasons: (1) district courts can only exercise original jurisdiction, and (2) the Supreme Court has the exclusive authority to review state supreme court decisions for alleged federal errors. In *Feldman, supra*, the Supreme Court reaffirmed the *Rooker* holding. The emergence of the *Rooker-Feldman* Doctrine, as it is now commonly known, provides that "although federal district courts have jurisdiction over general constitutional challenges, *Rooker* and *Feldman* prohibit such courts from exercising jurisdiction to decide federal issues that are inextricably intertwined with a state court's judgment." *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550, 1555 (11th Cir. 1989).

Under the *Rooker-Feldman* Doctrine, the federal court *cannot* exercise jurisdiction over constitutional claims inextricably intertwined with a state court's judgment, even where the federal plaintiff failed to raise such claim in state court. *Id.* at 1555, *citing Feldman*, 460 U.S. at 482 n. 16, 103 S.Ct. at 1315 n.16, 75 L.Ed.2d at 223 n.16.

preclusive effect to the state *administrative* hearing, committing error as discussed *infra*, that court found *no infirmity whatsoever* in the various state *court* adjudications. To the contrary, the Eleventh Circuit expressly acknowledged the competency of the Florida courts and recognized that those courts had an obligation to see that any and all previously unresolved, bona fide constitutional issues, whether factual or legal, became resolved.[24] *See* Op. at 1369, n.10; *accord Dade County v. National Bulk Carriers, Inc.*, 457 So.2d 213 (Fla. 1984).[25]

Because the County Commission's action had been adjudicated valid by multiple State *court* adjudications, Respondents at bar neither contended, nor had reason to contend, to the Eleventh Circuit, that *res judicata* should

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[24] The court held:

> [W]e are convinced that '[t]here is absolutely no reason why the courts of the State of Florida are any less competent than [a federal] Court to adjudicate the civil rights claim at issue.'

Op. at 1374 quoting federal district court opinion below.

[25] A requirement of Florida law, unique to *zoning appeals*, is that zoning is "by definition *invalid*" if it violates constitutional rights, such as accomplishing a "taking" without compensation. 457 So.2d at 216 (emphasis supplied). Rejecting the contention that constitutionally violative zoning could be upheld in Florida provided compensation was made, the Florida Supreme Court required that the cause "be remanded to the circuit court *for a determination of whether [constitutional rights were violated]* in which event the action of the Board must be stricken." *Id.* (emphasis supplied). Under Florida law, any unresolved issue as to the constitutionality of zoning, whether factual or legal, is required to be resolved within the context of a zoning appeal. This could, of course, involve a further remand to the County Commission by a state appellate court.

attach to County Commission *administrative* hearings. Despite the absence of such an issue and despite the State appellate court's express adjudication that there was not "any denial of Petitioners' procedural due process rights in any of the [administrative] proceedings . . . " 511 So.2d at 1013, the Eleventh Circuit gratuitously conducted its own weighing of evidence, made extensive findings of fact, and readjudicated the issue.

The Eleventh Circuit's readjudication of the state court holding was erroneous for several reasons. First, reversal of the state court adjudication was beyond the Eleventh Circuit's jurisdiction and in conflict with the Supreme Court's decision in *Feldman*. Second, the weighing of evidence and finding of facts in Petitioners' favor on an appeal from a summary judgment was impermissible.[26] Third, the Eleventh Circuit found no procedural impairment of the state court proceedings and properly afforded preclusive effect to the state adjudications as to the covenant and zoning validity. The court's discussion of procedural due process before the County

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[26] If it believes summary judgment is improper "the reviewing [federal] court may only determine whether a genuine issue exists and whether the law was applied correctly; it cannot decide disputed issues of material fact. . . .[I]t cannot simply substitute a judgment for the appellant." Wright, Miller & Kane, *Federal Practice and Procedure* Civil 2d § 2716, at 654 (1983) (*citing, e.g., Ed Houser Enterprises v. Gen. Motors Corp.*, 595 F.2d 366, 368 (7th Cir. 1979); *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 439 (3d Cir. 1973), *cert. denied*, 417 U.S. 937, 94 S.Ct. 2653, 41 L.Ed.2d 241 (1974)). Petitioners concede the impropriety, in general, of fact-finding by an appellate court. P.16, *et seq.*

Commission is but *obiter dicta*, legally improper and factually erroneous.[27]

The Petition at bar, which rests almost entirely upon the Eleventh Circuit's discussion of the administrative due process issue, is an attempt to have the Supreme Court compound the multitude of errors discussed above.

The Florida cases of *Huddleston* and *deCancino*[28] and the federal case of *Cala*,[29] cited by Petitioners at P.13-14, simply confirm that because a judgment does not, on its face, reflect all matters adjudicated, a court can look to the entire record as a basis for extending *res judicata* beyond the face of the judgment. This is consistent with what Petitioners contend the Florida courts did. It was unnecessary, however, for the Eleventh Circuit to do this with regard to the administrative procedural due process issue, which was expressly adjudicated on the face of the opinion of the Florida Third District Court of Appeal. The *Anderson*[30] case, cited at P.15, did not involve a state *court* decision, but rather a legislative interpretation of an ambiguous statute by an agency, without any

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[27] As detailed in the Statement of the Case, *supra*, the record before the district court demonstrates that Petitioners not only had abundant notice and ample opportunity to be heard by the County Commission, but also that there was extensive substantial competent evidence supporting the finding of a majority of consents to release the restrictive covenant.

[28] *Huddleston v. Graham*, 74 So. 414 (Fla. 1917); *deCancino v. Eastern Airlines, Inc.*, 283 So.2d 97 (Fla. 1973).

[29] *United States v. Cala*, 521 F.2d 605 (2d Cir. 1975).

[30] *Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980).

interpretation by the state's highest court. Those portions of the opinion about which Petitioners complain are not in conflict with any of the foregoing cases.

2. Restrictive Covenant

Section I of Petitioners' Argument is nothing more than a condensation of the 11-page argument which Plaintiffs presented to, and which was adjudicated by, the Florida Third District Court of Appeal. See R.Vol.II, Item 13, Exh. 4, p.17-27, captioned "Restrictive Covenant". Petitioners' seven separate attacks are enumerated in the applicable portion of Petitioners' index to their argument before the Florida Third District. R.Vol.II, Item 13, p.2. The applicable portion of that index is set forth at App. 5A.

The Eleventh Circuit Opinion properly afforded preclusive effect to the extensive Florida adjudications of the covenant issues. In an effort to improperly obtain belated review in the United States Supreme Court of the merits of the State adjudication, for which timely Supreme Court review was never sought, Petitioners erroneously state: "The opinion of the federal court of appeals *approving* the total extinguishment of a restrictive covenant by zoning resolution, conflicts with *Allen v. Avondale Co.*,[31] a decision of the Florida court of last resort." (emphasis supplied).

First, Petitioners mischaracterize the correct *preclusion* ruling of the Eleventh Circuit to be an "approval" on the merits of the covenent issue. Second, even assuming

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[31] *Allen v. Avondale Co.*, 185 So. 137 (Fla. 1938).

arguendo that the Eleventh Circuit had improperly readjudicated the release of covenant issue, there would be no conflict with *Allen v. Avondale.* Neither *Allen,* nor the Florida lower court cases cited by Petitioners[32] involved a unilateral restrictive covenant given *to* the County with an express provision for release *by* the County. To the extent that Petitioners assert that the Florida appellate court affirmances of the zoning at issue departed from essential requirements of Florida law, it is important to note that the Florida Supreme Court, which had an opportunity to rectify any purported conflict, found no reason to grant review. 520 So. 2d at 585.

Petitioners have neglected to apprise this Court of *Okaloosa Island Leaseholders Ass'n v. Hayes,* 362 So.2d 101 (Fla. 1978), in which the Florida Supreme Court upheld the validity of the same kind of procedure followed by the Dade County Commission in the case at bar. The court found that a public authority in its "zoning" capacity had authority to release a restrictive covenant based upon the consent of persons with an interest in surrounding property. Thus, even if the Eleventh Circuit had readjudicated the covenant issue, which it properly did not, that adjudication would be entirely consistent with the holdings of the Florida Supreme Court.

In *Board of Public Instruction v. Town of Bay Harbor Islands,* 81 So.2d 637 (Fla. 1955), cited by Petitioners, P.10, the Florida Supreme Court not only held a restrictive covenant like that in question here to be unenforceable,

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[32] *Tolar v. Myer,* 96 So.2d 554 (Fla. 3d DCA 1957); *Staninger v. Jacksonville Expressway Authority,* 182 So.2d 43 (Fla. 1st DCA 1966).

but also determined that under Florida law such instruments do not create the kind of proprietary or contractual rights that are within constitutional protections sought to be invoked by Petitioners. *Id.* at 642. Petitioners "legislative impairment of private contract" argument is misplaced because: (1) the instrument in question was not a contract but a unilateral instrument; (2) the instrument was not between private parties but between a developer and Dade County; (3) the instrument was a waivable condition of a prior zoning hearing; (4) the instrument by its *own terms,* was releasable exclusively by Dade County;[33] (5) the proper implementation of the release provision was affirmatively adjudicated by the Florida courts and correctly given preclusive effect by the Eleventh Circuit; and (6) the County's release came in the context of a judicial, rather than legislative, proceeding.[34]

Finally, Plaintiffs comment by footnote that "a challenge to a zoning action on grounds of violation of individual constitutional rights," is not encompassed within a zoning appeal in the Florida courts, P.11, n.6, is so "off the mark" as to merit little further comment. As discussed at length *supra,* not only may a violation of individual rights be raised in a zoning appeal but the courts *must* resolve the issue because zoning is "by definition invalid" if it is constitutionally violative. *See, e.g., Dade*

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[33] *See* note 5, *supra.*

[34] County Commission hearings have repeatedly been analyzed by Florida courts and found to be judicial in nature. *See, e.g., Rinker Materials Corp. v. Metropolitan Dade County,* 528 So.2d 904, 906, n.2, *on rehearing* (Fla. 3d DCA 1987), and cases cited therein; *Dade County v. Yumbo,* 348 So.2d 392, 394 (Fla. 3d DCA 1977).

County v. National Bulk Carriers and cases cited at Op. 1369.

3. No Denial of Due Process and Right to Jury Trial

The predicate for Petitioners' contention that they have been denied rights to due process and a jury trial is that they have a "contract" dispute. Because no constitutionally protected contract rights arose out of this instrument in favor of Petitioners, *see Board of Public Instruction of Dade County v. Town of Bay Harbor Islands*, 81 So.2d 637 (Fla. 1955). Petitioners' argument falls on the invalidity of its threshold assumption. Additionally, a restrictive covenant is a creature of equity, *Homer v. Dadeland Shopping Center, Inc.*, 229 So.2d 834 (Fla. 1969), and equitable claims do not give rise to a right to a jury trial. *Hawkins v. Rellim Investment Co.*, 92 Fla. 784, 110 So. 350 (1926).

Finally, as discussed *supra* at 22, Petitioners were not parties to the written instrument in question. Moreover, this instrument, *by its own terms*, vested Dade County with *exclusive jurisdiction* to release the same in accordance with procedures duly specified in the Dade County Code. These procedures involve only a County Commission hearing with the right of review in the various Florida appellate courts, which review Petitioners have fully pursued. Because any rights of Petitioners under the instrument in question emanate only from that instrument, and because Petitioners claim a violation of rights never bestowed by that instrument, they have no claim protected by the U.S. Constitution.

CONCLUSION

Respondents request that the Petition be denied.

Respectfully submitted,

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No. 89-1062

In The

Supreme Court of the United States

October Term, 1989

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., ROLLING OAKS HOMEOWNERS' ASSN., INC.; MILDRED HARRIS; BARRY YOUNG; and NORINE FLETCHER,

Petitioners,

vs.

DOLPHIN STADIUM CORP., a Florida corporation; JOSEPH ROBBIE; DADE COUNTY, a political subdivision of the State of Florida; LAWRENCE MORTON, EMIL MORTON, individually and as Trustees, LOTTIE MORTON, individually and as Trustee, ALAN MORTON, and MAX BODERMAN, d/b/a MORTON PROPERTIES; SOUTH FLORIDA REGIONAL PLANNING COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX

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[878 F.2d 1360]

LAKE LUCERNE CIVIC ASSOCIATION, INC., et al.,
Plaintiffs-Appellants,

v.

DOLPHIN STADIUM CORP., et al.,
Defendants-Appellees.

No. 88-5383.

United States Court of Appeals,
Eleventh Circuit.

Aug. 3, 1989.

Florida property owners brought action challenging rezoning of county land for sports stadium complex, claiming that rezoning impaired their contract rights and violated substantive due process and their civil rights. The United States District Court for the Southern District of Florida, No. 87-1546-CIV, Eugene P. Spellman, J., entered summary judgment against property owners, and they appealed. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that: (1) initial state litigation did not preclude instant suit; (2) county zoning hearing did not have preclusive effect; (3) subsequent state litigation precluded impairment of contract and substantive due process claims; (4) taking claim was not precluded; and (5) abstention under *Colorado*

[878 F.2d 1361]

River was not appropriate with respect to discrimination claim.

Affirmed in part; reversed in part and remanded.

H.T. Smith, George F. Knox, Long & Knox, P.A., Miami, Fla., for plaintiffs-appellants.

Glenn J. Waldman, Stroock & Stroock & Lavan, Robert L. Shevin, Miami, Fla., for Dolphin & Robbie.

Samuel S. Goren, Josias & Goren, P.A., Ft. Lauderdale, Fla., for South Florida Regional Planning Council.

Robert L. Krawcheck, Dade County Atty., Miami, Fla., for Dade County.

Stephen H. Reisman, Rosenberg & Reisman, Miami, Fla., for Mortons, Boderman.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge,
VANCE, Circuit Judge, and
KAUFMAN*, Senior District Judge.

[878 F.2d-1362]

KAUFMAN, Senior District Judge.

The institution of this federal case is the latest round of litigation following a series of state trial and appellate court proceedings related to the construction of a new sports stadium complex in Dade County, Florida. In this federal case, appellants, three individual homeowners and three homeowner associations,[1] assert that their

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

[1] While neither the court below nor any appellee has questioned the standing of any appellant, this Court notes that that question might be raised as to certain of the corporate appellants. However, because each of the individual appellants possesses standing, and because all appellants are asserting the

(Continued on following page)

contract rights have been unconstitutionally impaired (Count I), that the applicable zoning resolution of the Board of Commissioners of Dade County was adopted in violation of appellants' substantive due process rights (Count II), and (in Count III) that appellants' "civil rights have been abrogated" by appellee Dade County and by other defendants acting "under color of [state] law" by "a stark pattern of discriminatory practices affecting the property and housing rights of black citizens." Appellants seek declaratory and equitable relief, monetary damages, attorney's fees and costs and have prayed a jury trial. Jurisdiction is asserted, and is present, under 28 U.S.C. § 1331 and § 1343.

Appellees are Dade County, Florida, South Florida Regional Council, the Dolphin Stadium Corporation, and individuals and trustees alleged to be developers of the stadium and adjacent commercial enterprises associated with the stadium complex.[2] The district court granted summary judgment for appellees and assessed costs against appellants.

(Continued from previous page)

same grounds for relief, it is not necessary for this Court to inquire concerning the standing of the corporate appellants. *See Carey v. Population Services International*, 431 U.S. 678, 682, 97 S.Ct. 2010, 2014, 52 L.Ed.2d 675 (1977).

[2] Whether appellants have stated, or even have intended to state, each and all of their allegations against each appellee is not clear from the record before us and should be clarified by the district court on remand.

Factual and Procedural Background

The stadium complex includes the home of th Miami Dolphins professional football team plus a com mercial and industrial development. It is located on mo than 430 acres in an area in northwestern Dade Count known as Lake Lucerne. The land for the project wa donated, subject to certain rights of reversion, by certai of the individual and/or trustee appellees to the Count which in turn leased it to appellee Dolphin Stadiu Corporation.

In 1977, the property, then owned by certain of th appellees, was rezoned from agricultural to single-famil and townhouse use. At that time, pursuant to the reque of the Dade County Board of County Commissioners, th owners subjected the property to a covenant restrictin its commercial use. That covenant included the followin provision:

> This Agreement may be modified, amended, or released as to any portion of the land described herein by a written instrument executed by the then-owner of the fee-simple title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the [Metropolitan Dade County Comprehensive Development Master] Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan Dade County, Florida, whichever by law has jurisdiction over such subject matter.

Subsequently, after plans were formulated for what has now become the stadium complex, the developers were apparently unable to obtain the necessary consents to obtain release of the restrictive covenant as to the entire desired area. Therefore, they reduced the area requested for rezoning by creating a 351 foot setback from two nearby housing developments, thus eliminating the need for consents from the property owners in that setback area. Also, the

[878 F.2d 1363]

developers construed the restrictive covenant as assigning to the owner of each parcel of land, including Dade County and the State of Florida, one vote per parcel regardless of how many parcels that person owned. Pursuant to that construction, the developers obtained the consents of the owners of 111 out of a total of 161 parcels in the reduced area – more than a majority vote of the owners on a parcel-by-parcel basis, but the votes of only 18 of the 55 owners of all of the parcels – far short of a majority of such owners.

The "Rolling Oaks" Litigation

In Mildred Harris, et al. v. Dade County, et al. ("Rolling Oaks I"), filed December 21, 1984 in the Circuit Court for Dade County, two of the three individual appellants and one of three corporate appellants in this appeal brought suit for equitable and legal relief, seeking to prevent construction of the stadium project. Defendants in that case were all of appellees in this federal action. On August 23, 1985, the circuit court dismissed, with prejudice, four counts of the nine-count complaint, and dismissed the five other counts as premature, with leave to amend. With respect to the dismissals with prejudice, the

circuit court concluded that: (1) Count I, in which plaintiffs contended that the gift of public land to a private for-profit development was not a proper public purpose, was without merit because the need for a sports stadium constituted a proper public purpose, even if the stadium was being developed by a private party; (2) Count II, in which plaintiffs alleged lack of proper notice of a public hearing, did not entitle appellants to relief because Dade County had properly exercised its discretionary powers and because the notice and hearing requirements did not apply to county land conveyed for the purposes involved; (3) Count III, in which plaintiffs asserted an illegal contract for zoning, did not state a ground for relief because the Dade County zoning authorities had not contractually obligated themselves to make any zoning change; and (4) Count VIII, in which it was alleged that the law requiring bidding for acquisition of county property had been disregarded, failed to state a cause of action because the applicable law, as was the case with Count II, did not apply to county land conveyed by the County for the specific purpose involved.

With respect to the counts in *Rolling Oaks I* held to be premature and dismissed with leave to amend after final action by the Dade County Board of County Commissioners, the circuit court concluded: (1) Count IV, in which it was contended that appellees were prohibited by the restrictive covenant from making a zoning change, provided no basis for relief because that covenant itself expressly provided for modification, and because "[a]ny judicial determination of the continued viability of the restrictive covenant prior to a final administrative action rezoning the subject property would be unnecessary and

premature";[3] (2) Count V, in which it was alleged that the promised rezoning was substantially invalid, was not meritorious because no final action had been taken by the Board of County Commissioners and because administrative remedies in that regard had not been exhausted; (3) Count VI, in which plaintiffs asserted a violation of the law prohibiting the obligation by the County of unapproved funds and the pledging of the County's credit, could not be maintained prior to such expenditure or contract to expend public funds; (4) Count VII, in which plaintiffs claimed that the County violated an industrial revenue bonds statute, did not state a basis for immediate relief because the stadium, as a public project, qualified for the issuance of industrial revenue bonds, and because a suit seeking declaratory judgment concerning the validity of any such bond issue would constitute an advisory opinion; and (5) Count IX, in which it was urged that the rezoning constituted a taking without just compensation, was prematurely stated pending application of the zoning ordinance to plaintiffs' property.

[878 F.2d 1364]

On appeal, in *Rolling Oaks Homeowner's Ass'n, Inc., et al. v. Dade County, et al.*, 492 So.2d 686 (Fla. 3d D.C.A.1986) ("*Rolling Oaks II*"), in a per curiam opinion filed June 26, 1986, the District Court of Appeal for the Third District concluded that the five counts dismissed as premature with leave to amend should have instead been dismissed without leave to amend, "allowing the refiling of a new suit if, as and when such alleged causes of

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[3] *Rolling Oaks I* at p. 13. Copies of the opinions in *Rolling Oaks I* and in *Norwood-Norland I, see infra* at p. 1364, and of Judge Spellman's opinion below are in the record in this case.

action mature." *Id.*, at 688. The district court also held that Count VIII was not prematurely brought and remanded that claim for further consideration by the circuit court. Otherwise, the district court affirmed the circuit court's holdings.[4]

The Zoning Hearing

On September 26, 1985, after the decision in *Rolling Oaks I* and before the decision in *Rolling Oaks II*, a rezoning hearing took place before the Dade County Board of County Commissioners. During that hearing some of appellants in this appeal, several county officials, certain attorneys, some of whom are of counsel in this appeal, residents and community leaders supporting and opposing the stadium project, and the Reverend Jesse Jackson testified. The restrictive covenant and whether it had been properly released were discussed at length.

The hearing concluded late at night after the Board of County Commissioners passed and adopted a zoning resolution by vote of 7-1, with one commissioner absent, changing the zoning for several plots within the area of the stadium complex from residential to commercial and/or industrial use, and designating certain land for stadium use. Promulgated along with that zoning action was a Development of Regional Impact Order relating to air and light and providing for noise and pollution barriers

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[4] There is nothing in the record before us to indicate whether there has ever been any further consideration by any Florida court of any issue not determined on a final basis in *Rolling Oaks I* and *II* or of any issue remanded in that litigation by the district court to the circuit court.

and adequate parking facilities. Compliance with that Order was required before construction of the stadium complex could be commenced.

The "Norwood-Norland" Litigation

Certain of the present appellants and other homeowners and homeowner associations filed an appeal in a Florida circuit court concerning the zoning action. In that case, *Norwood-Norland Homeowners' Ass'n, Inc., et al. v. Dade County, et al.* ("*Norwood-Norland I*"), those plaintiffs challenged the rezoning as an improper deviation from the Dade County Master Plan, and also asserted the wrongful termination of the restrictive covenant by the County Commissioners.

In an opinion filed on August 18, 1986, a three-judge circuit court panel held that the property in question had been designated in the Master Plan as a Sub-Metro Activities Center, and that the building of a sports complex did not constitute a deviation from that Plan. Noting that its function was to "determine whether the zoning changes are a reasonable and appropriate exercise of legislative power, and whether the zoning is fairly debatable," the circuit court concluded that reasonable minds could differ as to whether the resolution bore a "substantial relationship to the public welfare" and upheld the rezoning on that basis.

With respect to the release of the restrictive covenant, the circuit court, with one judge dissenting, determined that the County's construction of the covenant was entitled to great deference and that appellants had failed to

meet their burden of showing that the County's construction of the covenant permitting one vote per parcel, and voting by Dade County and the State of Florida, was clearly erroneous.

Thereafter, in *Norwood-Norland Homeowners' Ass'n, Inc., et al. v. Dade County, et al.*, 511 So.2d 1009 (Fla. 3d D.C.A.1987), *review denied*, 520 So.2d 585 (Fla.1988) ("*Norwood-Norland II*"), the district court denied a petition for certiorari review of the circuit court's opinion, writing:

> The circuit court is charged with determining whether the agency or municipali-
>
> [878 F.2d 1365]
>
> ty accorded procedural due process rights, observed the essential requirements of law, and supported its findings with substantial, competent evidence. It is axiomatic that "zoning or rezoning is the function of the appropriate zoning authority and not the courts. . . ." *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla.1978). Reviewing courts are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives. Instead, the scope of review is one which recognizes a zoning authority's power to impose reasonable regulations in furtherance of health, safety and community welfare, and to determine, on the evidence before the court, whether the local authority's zoning decision is "fairly debatable." The "fairly debatable" test asks whether reasonable minds could differ as to the outcome of a hearing. If so, the court should sustain a county commission's resolution.

The scope of *this* court's review of a circuit court order rendered in its appellate capacity in

> an administrative action is even narrower. . . .[T]his court's review is limited to determining whether procedural due process was afforded, and whether the correct law was applied. Petitioners are *not* entitled to a second or third full appeal in this court.
>
> However, . . . the standards do not necessarily end here. When, as appears in this case, the zoning authority has approved a use more *intensive* than that proposed by the plan, the decision must be subject to "stricter scrutiny" than the "fairly debatable" standard contemplates. Zoning decisions must not only meet the "fairly debatable" standard, but they also should be "consistent" with the comprehensive land use plan.

Id. at 1012 (emphasis in original; certain citations omitted).

Post-Construction Events

On June 18, 1987, after the stadium had been constructed, appellants in this action filed a suit in Dade County Circuit Court, namely, *Lake Lucerne, et al. v. Dade County, et al.*, in which they alleged (1) unconstitutional impairment of contract rights; (2) unlawful gift of public property; (3) unlawful public burden created by a private stadium; (4) substantive unconstitutionality of the zoning resolution; and (5) violation of appellants' civil rights. That action was subsequently – and is still – stayed at the request of appellants pending determination of the issues presented in this federal action now before us.

On August 20, 1987, appellants commenced the instant suit in the United States District Court for the Southern District of Florida, asserting: (1) unconstitutional impairment of contract rights; (2) substantive

unconstitutionality of the zoning resolution; and (3) civil rights violations under 42 U.S.C. § 1983, *et al.* In their motions to dismiss treated by Judge Spellman as motions for summary judgment,[5] appellees relied, *inter alia*, upon principles of res judicata, collateral estoppel and abstention.

On March 22, 1988, Judge Spellman granted summary judgment for appellees, holding that Counts I and II were barred by principles of collateral estoppel and/or res judicata, and that as to Count III, principles of res judicata and also of abstention warranted dismissal. Earlier, Judge Spellman had considered appellants' requests for preliminary injunctive relief because of the alleged failure by Dade County and by Dolphin Stadium Corporation to fulfill their obligations concerning adequate parking and adequate safeguards with regard to light, air, noise and pollution. After a nonevidentiary hearing on August 27, 1987, Judge Spellman deferred determination concerning the preliminary injunction motion and, in effect, consolidated the latter with the merit issues which he disposed of on March 22, 1988. It is from that March

[878 F.2d 1366]

22, 1988 determination that this appeal has been taken.

Preclusion Generally

The District Court determined that the doctrines of both res judicata, or claim preclusion, and collateral

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[5] Judge Spellman, in the court below, appropriately treated appellees' motions to dismiss as motions for summary judgment after giving appropriate notice to the parties that he would so do.

estoppel, or issue preclusion, applied to Counts I and II.[6] In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court "made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984). In *Migra*, the Supreme Court held that the same preclusive effect applied to a claim which "a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding," *Id.*, and that pursuant to the Full Faith and Credit Clause of the Constitution, art. IV, § 1, and the federal full faith and credit statute, 28 U.S. C. § 1738, "[i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Id.* at 81, 104 S.Ct. at 896. *See also Gjellum v. City of Birmingham, Alabama*, 829 F.2d 1056, 1060 (11th Cir.1987).

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[6] "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect is also referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar." *Migra v. Warren City School District Board of Education*, 465 U.S. at 77 n. 1, 104 S.Ct. at 894 n. 1 (citations omitted). *See also* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402.

Under Florida law,

> [i]t has been well settled . . . that several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the complaint is made. It is also a settled rule that when the second suit is between the same parties, but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it. . . .The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.

Albrecht v. State, 444 So.2d 8, 12 (Fla.1984) (citations omitted). It is in that context that we now examine the preclusive effects of the *Rolling Oaks*, zoning and *Norwood-Norland* proceedings.

Preclusive Effects of the "Rolling Oaks" Litigation

In *Rolling Oaks I* and *II*, direct attacks were made, before rezoning of the Lake Lucerne area, upon the development of the Dolphin stadium complex. In that litigation, five of the counts were deemed premature; accordingly, they could thereafter be appropriately and timely stated in a subsequent court action.[7]

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[7] "In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for

(Continued on following page)

As to the other counts in *Rolling Oaks* I and II, they raised different issues than those presently advanced in the within case. Accordingly, the identity of issues needed for *Rolling Oaks* collaterally to estop the instant suit is not present. Moreover, since this is a separate cause of action, in which substantially different questions are raised, res judicata cannot apply. *Albrecht*, 444 So.2d at 12. In sum, the *Rolling Oaks* litigation does not preclude any of plaintiffs' claims in this federal court action.

[878 F.2d 1367]

Preclusive Effects of the Zoning Hearing

Appellees ask us to treat the September 26, 1985 hearing before the Board of County Commissioners of Dade County as a quasi-judicial proceeding and to apply to that Board's decision the preclusive effect of a state court adjudication. In response, appellants characterize rezoning by the Board as legislative in nature and entitled to no preclusive effect because of the lack of the due process trappings required in a judicial-type proceeding. While we agree with the result sought by appellants, our reasoning is slightly different. "Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative

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(Continued from previous page)

prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend upon the same precondition." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4437, p. 347.

agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-60, 16 L.Ed.2d 642 (1966) (footnotes omitted). "When [formality in an administrative hearing] is sufficiently diminished, the administrative decision may not be res judicata. The starting point in drawing the line is the observation that res judicata applies when what the agency does resembles what a trial court does." 4 K. Davis, *Administrative Law Treatise* 52 (2d ed. 1983).

Florida courts have long recognized and applied in appropriate instances administrative preclusion principles to zoning hearings. *See Coral Reef Nurseries, Inc. v. The Babcock Co.*, 410 So.2d 648, 651-53 (Fla. 3d D.C.A.1982) (and cases there cited). Under those principles, it is "the character of the administrative hearing [which] . . . determines . . . the applicability of the doctrine of administrative res judicata." *Coral Reef*, 410 So.2d at 652. Thus, it is necessary to examine the "procedural due process which is afforded to the interested parties," that is, "the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses." *Id.* A review of the transcript of the hearing of September 26, 1985 reveals that that proceeding fell far short of meeting those judicial-type standards.

From the beginning, the zoning hearing was a rather raucous affair. Because he had to catch a plane, the Reverend Jesse Jackson was the first formally to speak; he

strongly opposed the project. He was not questioned by the Commissioners or counsel or anyone else. His testimony resembled a presentation before a congressional committee more than testimony in a court of law. After Reverend Jackson left, county officials and attorneys for persons favoring the Dolphin Stadium project spoke. They were repeatedly interrupted by shouts of residents, which in turn caused the Mayor as the Commission chairman to instruct the residents to quiet down and allow the hearing to proceed in a more orderly fashion. Such participation by the opponents of the project, while undeniably unconstructive, hardly amounted to cross-examination. Also, there was no ordered or directed questioning of the witnesses by the Commissioners or anyone else.

More specifically, there was no quasi-judicial treatment of the release of the restrictive covenant during the hearing. Proponents of the project explained to the Commissioners how the release had been validly obtained. They were interrupted by residents in the manner indicated previously, but no discussion of applicable law and facts with reference to the restrictive covenant occurred. Nor is there anything on the record to indicate that the Board considered the authenticity of the consents obtained to release the restrictive covenant.[8] In that

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[8] Appellees argue that the Commissioners must have assumed that the release was valid when they adopted the rezoning resolution. In this sense, say the appellees, the Commissioners considered the 351 foot setback and the method of apportioning votes as well. Since we conclude that the zoning hearing was not conducted in a sufficiently judicial manner to afford to it preclusive effect, we need not reach those contentions of appellees, though they are hardly overly persuasive.

regard, it must be empha-

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sized that such failure did not occur because appellants failed to seize the opportunities to explore that issue; rather, it was the structure of the hearing itself which patently failed to provide those opportunities. The record itself belies appellees' contention that the Commissioners acted in the judicial manner required if a preclusive effect is to be given to administrative action. Accordingly, the zoning determinations do not themselves preclude appellants from making their claims in the instant case.

Preclusive Effects of the "Norwood-Norland" Litigation

After the zoning hearing, the *Norwood-Norland* litigation reached first a Florida circuit court and then a Florida district court. That litigation involved a direct appeal from the zoning action. It did not involve a claim of unconstitutional taking without compensation. That latter issue was not raised until the still pending and stayed state court proceeding and this federal case were filed.

In determining the preclusive effect to be given in this case to *Norwood-Norland I* and *II*, our inquiry is not confined to what was presented and pled during those state court proceedings. Rather, we must also examine the scope of the reviewing authority of those state tribunals, for if those state courts lacked jurisdiction to entertain an appeal from the administrative action an issue presented herein, the determinations of that issue by those state courts cannot have a preclusive effect. "Judicial finality – the predicate for *res judicata* – arises only from a final decision rendered after the parties have been given a

reasonable opportunity to litigate a claim before a court of competent jurisdiction." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir.1984), *quoting Kaspar Wire Works, Inc. v. Leco Engineering & Machine*, 575 F.2d 530, 537-38 (5th Cir.1978) *See Davis V. Dieujuste*, 496 So.2d 806, 808-10 (Fla.1986); *Estate of Paulk v. Lindamood*, 529 So.2d 1150, 1154 (Fla. 1st D.C.A. 1988). Also, as we consider the issue of preclusive effect of the *Norwood-Norland* litigation, we need to keep in mind the nature of relief sought, i.e., the invalidity of the zoning action and *not* the question of whether the zoning action constituted an uncompensated taking. It is in those contexts that we analyze the specifics of whether and to what extent the *Norwood-Norland* holdings, in and of themselves, preclude the grant of relief sought by appellants in this federal litigation.

Count I – Impairment of Contract Rights

Appellants contend that their contract impairment claim as stated in Count I in this case was not decided in the *Norwood-Norland* litigation because the Florida courts did not determine whether the consents for release of the restrictive covenant were valid and whether the zoning resolution constituted an unconstitutional interference with appellants' contractual rights. That contention may not prevail, since in *Norwood-Norland I* the circuit court considered the Board's resolution and evaluated the substantive legal claims which appellants now again assert, namely, the propriety of the 351-foot setback, the apportionment of votes per parcel rather than per owner, and the rights of Dade County and the State of Florida, as individual owners of parcels, to one vote for each parcel

owned.[9] Because the circuit court did adjudicate those questions, its determinations are entitled to preclusive effect if it had jurisdiction over those issues on appeal from the administrative zoning action.

Under Florida law, "[w]here a party is entitled as a matter of right to seek review

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in the circuit court from administrative action, the circuit court must determine whether [in the administrative proceeding] procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law." *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla.1982). *See also Norwood-Norland II*, 511 So.2d at 1012.

The purpose of such a restricted scope of review is to guard against the substitution of the judgment of the courts for that of the administrative body in the exercise of the latter's powers, *see Metropolitan Dade County v. Brisker*, 485 So.2d 1349, 1351 (Fla. 3d D.C.A.), *review denied*, 494 So.2d 1151 (Fla.1986); *Dade County v. Yumbo*,

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[9] The circuit court concluded with respect to the 351-foot setback: "It is not controverted . . . that appellees had a right to change the application prior to the rezoning hearing." As to the other contentions, that court wrote that "[t]he construction given by the County in the zoning proceedings should be given great weight," and stated that the appellants failed to meet their burden of showing that the homeowners, and not the developers, were the ultimate intended beneficiaries of the covenant.

348 So.2d 392, 394 (Fla. 3d D.C.A.), *cert. denied*, 354 So.2d 988 (Fla.1977), at least when the administrative action is not arbitrary or discriminatory, and when reasonable minds can differ as to the benefits of the administrative action. Reversal by a Florida court is not warranted simply because, as a reviewing court, it might prefer a different result than that reached by the administrative zoning authority. Nonetheless, Florida law does not call for its courts to rubber-stamp administrative zoning actions, but rather carefully to consider their validity or invalidity. *See, e.g., Gulf Pines Memorial Park v. Oaklawn Memorial*, 361 So.2d 695, 698-99 (Fla.1978).

In accordance with those principles, the circuit court in *Norwood-Norland I* considered whether the release of the covenant was valid and, in so doing, concluded that essential legal requirements had been met and that substantial evidence existed to support the zoning actions. Also, in the *Norwood-Norland* litigation, the circuit and district courts accepted the County Commissioners' construction of the covenant. Thus, appellants are not entitled to consideration by this court on the merits of the validity of the zoning authority's actions with respect to the restrictive covenant and its release.[10] In that light, we

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[10] Appellants contended during oral argument before us that neither the circuit court nor the district court determined in *Norwood-Norland I* or *II* whether the releases were authentic. That is apparently true. However, counsel, during oral argument before us, stated that the circuit court had the boxes of releases before them. Thus, that court could have determined their authenticity if that court had been specifically asked so to

(Continued on following page)

affirm Judge Spellman's application of res judicata to Count I.[11]

Count II – Substantive Unconstitutionality of the Zoning Resolution

Substantive Due Process

Appellants complain in Count II that the rezoning for the stadium development violated the Dade County Comprehensive Land Use Plan and destroyed appellants' expectation of a residential neighborhood. In so doing, appellants seemingly allege denial of substantive due process based upon violation of the Land Use Plan, and also apparently contend that enforcement of the zoning action without appropriate arrangements with respect to air, light, noise, pollution and parking constitutes a taking of appellants' property without just compensation.

"Where property interests are adversely affected by zoning the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns. . . ." *Schad v. Mt. Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981). *See*

(Continued from previous page)

do. However, appellants seemingly did not so request. Having not pressed that opportunity in *Norwood-Norland*, appellants cannot so do in this federal litigation.

[11] In the court below, appellants sought partial summary judgment with respect to the claimed violation of the restrictive covenant. That claim may of course not succeed in this case in view of the preclusive effect to which we hold the Florida court's determinations in *Norwood-Norland are entitled.*

Rogin v. Bensalem Township, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied sub nom. Mark-Garner Assoc., Inc. v.*
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Bensalem Township, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981) ("The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest."). *See also Shelton v. City of College Station*, 780 F.2d 475, 482-83 (5th Cir. en banc), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986). In *Norwood-Norland I*, the circuit court explicitly noted that construction of a sports stadium was a legitimate public purpose under Florida law, and that it comported with the Land Use Plan. The district court, in review of the circuit court, wrote that "[w]hen . . . the zoning authority has approved a use more *intensive* that that proposed by the plan, the decision must be subject to 'stricter scrutiny' than the 'fairly debatable' standard contemplates. Zoning decisions must not only meet the 'fairly debatable' standard, but they also should be 'consistent' with the comprehensive land use plan." *Norwood-Norland II*, 511 So.2d at 1012 (emphasis in original). Under that "strict scrutiny" standard of review, the district court affirmed the circuit court's determination of the existence of a legitimate public purpose under state law. Thus, because the Florida state courts have addressed appellants' substantive due process concerns, appellants are precluded from relitigating those questions in this federal action.

Taking

That brings us to appellants' taking claim. "Although a zoning ordinance or other law comports with the requirements of substantive due process, it nonetheless

may violate the 'taking' clause of the Fifth Amendment that is applicable to the states through the Fourteenth Amendment. Thus, if an otherwise valid law severely diminishes the value or impairs the use of a parcel of land, the state or local government may be constitutionally obligated to compensate the owner." *Rogin*, 616 F.2d at 690 (footnotes omitted).[12]

In *Albrecht v. State, supra*, certain landowners, after exhausting the state administrative process, unsuccessfully filed a petition against the Department of Environmental Regulation of Florida in a Florida District Court of Appeal challenging the facial validity of a Florida statute under which that Department had denied a dredge and fill permit on the land involved. The Supreme Court of Florida refused to grant certiorari review. The landowners then brought a new suit in a Florida circuit court, alleging an unconstitutional taking without compensation and seeking compensation for inverse condemnation. In the new case, writing for a unanimous court, Justice Adkins noted that "a claim of uncompensated taking constitutes a separate and distinct cause of action from that litigated previously." *Id.* at 12. The first involved a challenge to "the propriety of the agency's actions," while the second related to a claim of taking without compensation. *Id.* Justice Adkins stated that "the standards necessary for exercise of the police power" may be met, but nevertheless may "result in a taking," and that "the propriety of the agency action must be

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[12] *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Schad*, 452 U.S. at 68, 101 S.Ct. at 2182; *Developments in the Law – Zoning*, 91 Harv.L.Rev. 1427, 1462 (1978).

finally determined before a claim of inverse condemnation exists." *Id.* Justice Adkins concluded that "the doctrine of res judicata [had been] improperly applied" by the circuit court and stated:

> Permitting the petitioners to bring their claim in circuit court does not conflict with out decision in *Key Haven* [427 So.2d 153 (Fla.1982)]. In that case we provided alternative methods of bringing a claim of inverse condemnation once all executive branch review of the action has been completed. Direct review in the district court of the agency action *may* be eliminated and proceedings properly commenced in circuit court *if* the aggrieved party accepts the agency action as proper. *Key Haven,* 427 So.2d at 159. The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists. In *Key Haven* we merely provid-
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> [878 F.2d 1371]
>
> ed an alternative to direct review for those parties who wish to accept the propriety of the action. This was not meant to extinguish the property owner's right to bring the separate claim of inverse condemnation in circuit court at the conclusion of all judicial as well as executive branch appeals regarding propriety of the action. Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. We emphasized that once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper. *Id.* at 160. This is not to say that once a party chooses to litigate the propriety of the action through the district court that it is estopped

> from bringing a claim of inverse condemnation in circuit court.

Id. at 12-13.

In *Dade County v. National Bulk Carriers*, 450 So.2d 213 (Fla.1984), in an opinion filed five months after *Albrecht*, the property owner had been denied a use permit to excavate a lake on its property in order to build, by fill, certain of its land to a higher point of elevation. The zoning commissioner also rezoned the property for preservation purposes. On appeal, the circuit court, in upholding the administrative zoning action, "noted that its opinion should not be construed as a denial of [a landowner's] right to raise the taking issue in a separate action." *Id.* at 215. Writing for the Supreme Court, Justice Adkins remanded, holding that the court below had misconstrued a Florida statute and also because:

> In our recent decisions in *Albrecht v. State, and Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, we recognized the proposition that under certain circumstances a statute or regulation may meet the standards necessary for an exercise of the police powers and authorize a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 [43 S.Ct. 158, 67 L.Ed.322] (1922); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 [102 S.Ct. 640, 70 L.Ed.2d 618] (1981). In *Albrecht* we held that a claim of uncompensated taking constitutes a separate and distinct cause of action from an action challenging the propriety of an agency's action in denying a permit to dredge and fill. We recognized that the determination, judicially or otherwise, that such an action was authorized under the applicable statute does not necessarily also determine that there is no taking. We distinguished between a zoning change or denial on the one hand and a permit denial on the other hand in

> *Key Haven*. We explained that "[a] zoning ordinance is, by definition, *invalid if it is confiscatory*," 427 So.2d at 159, and consequently, no inverse condemnation would be necessary. On the other hand, as in *Key Haven*, if the "statute authorizes a permit denial which is confiscatory," *id.*, a separate condemnation proceeding is an appropriate remedy. Under the type of statutory permitting-scheme involved in *Key Haven*, *Albrecht*, and *Graham v. Estuary*, it was contemplated that its application may result in a taking. Such is not the case in the application of a zoning ordinance. To be valid, it must be reasonable. If a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken. We hold that this cause should be remanded to the circuit court for a determination of whether the county's action is confiscatory and constitutes a taking without just compensation, in which event the action of the board must be stricken. A denial of rezoning cannot be both reasonable and confiscatory.

Id. at 215-16 (certain citations omitted).

Our decision in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir.1987), involved a § 1983 suit for damages for inverse condemnation by Florida zoning action, and required this court to apply *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172,

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105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In *Williamson*,

> the Supreme Court of the United States held that a Section 1983 claim for money damages stemming from a regulatory taking of property in violation of federal constitutional rights is not ripe for review on the merits until the Plaintiff demonstrates, first, that a final decision by the relevant authority

regarding application of the regulation to the subject property has been made, i.e., the "initial decision-maker has reached a definitive position on the issue that inflicts an actual, concrete injury," 473 U.S. at 193 [105 S.Ct. at 3120]; and second, that no adequate state remedy, such as inverse condemnation, is available to redress the injury occasioned by the final decision. *Id.* at 196-97 [105 S.Ct. at 3121-22]. The rationale of the Court is that, absent the state's denial to a property owner of just compensation, there can be no cognizable harm to any federal constitutional right. 473 U.S. at 194 n. 13 [105 S.Ct.at 3120 n. 13]. ("The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").[2]

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[2] The appellant in *Williamson County* had challenged the zoning ordinance as invalid on two theories: First he argued it violated the Fifth Amendment's Just Compensation Clause, as applied to the states through the Fourteenth Amendment; alternatively, he claimed the regulation was a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution. Because the Court found the action was not ripe for review, it did not reach the merits of the appellant's challenges or decide whether a confiscatory zoning regulation – a "taking" – is more appropriately considered a violation of the Due Process or the Just Compensation Clause. Nevertheless, in holding that the claim was premature under either theory, id. at 199-201 [105 S.Ct. at 3123-3124], the Supreme Court implicitly ruled that the same ripeness test must be applied to both claims.

Corn, 816 F.2d at 1515-16 (certain citations omitted).

In *Corn*, over a period of more than ten years, there were numerous zoning actions and state court decisions affecting the property involved. As in this case, the taking

issue had not been decided in any of those proceedings. Accordingly, as did this court in *Corn*, "[w]e note at the outset that there is no issue the first prong of *Williamson County's* ripeness test has been satisfied" and that "[t]he remaining dispute centers on fulfillment of *Williamson County's* second prong: whether, in fact, there exists an available and adequate state remedy to compensate [the landowner] for his loss." *Id.* at 1516. After discussing Florida law as set forth in *National Bulk Carriers, Albrecht* and *Key Haven*, including the absence of an action for inverse condemnation as a remedy when a valid zoning change has occurred and the availability of such an action when a permit denial is involved, this court held in *Corn*:

> In light of the foregoing, we conclude that Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance later declared invalid. We further find no support for the availability of an action for money damages, based either on trespass or violation of the right of due process, as guaranteed by the Florida Constitution.[8] As discussed above, the cited authorities are persuasive that the remedy of invalidation is an exclusive one pursuant to Florida law, because zoning is a function of the police power rather than the exercise of eminent domain.

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[8] Article 1, Section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law. . . ."

Id. at 1519.

While it is difficult, as it was in *Corn*, to classify the contentions in Count II of the complaint in this case as growing totally out of alleged invalidity of a zoning ordinance rather than something more akin to denial of a permit, on balance, it would appear that we are dealing with more of the former than the latter. Accordingly, we hold that the second prong of *Williamson County* has been satisfied and that appellants, on remand, may pursue under

[878 F.2d 1373]

42 U.S.C. § 1983, their taking claim in this case. That claim requires determination of whether or not appellants have suffered sufficient diminution of their property rights from the occurrences of which they complain in this case, so as to entitle them to any compensation. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Developments in the Law – Zoning*, 91 Harv.L.Rev. 1427 (1978).[13]

Count III – Alleged Pattern of Discrimination

In their third count, the individual appellants, who are black residents of the Lake Lucerne area, claim a history of unconstitutional and discriminatory community development by appellee Dade County, and a conspiracy among the County and appellees South Florida Regional Planning Council, Dolphin Stadium Corporation, Joe Robbie, and Morton Properties to further the interests of the developers of the Dolphin Stadium project while ignoring the property rights of appellants. The

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[13] Whether or not, after appropriate discovery opportunity is afforded to the parties, there will remain any triable fact issue with regard to the taking claim will be up to the district court, on remand, to determine.

district court abstained from exercising federal jurisdiction over the claims of appellants, brought pursuant to 42 U.S.C. § 1983, *et al.*, in Count III because of the pending state action, which contained a similar count. In so doing, the district court applied the abstention standards stated by the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-16, 103 S.Ct. 927, 936-37, 74 L.ed.2d 765 (1983). Appellees rely upon those determinations by Judge Spellman and also contend that appellants' Count III contentions are barred by principles of preclusion. The latter argument may not prevail since appellants' Count III civil right claims represent different allegations than the attacks in *Rolling Oaks I* and *II* and in *Norwood-Norland I* and *II*. In addition, while there was some discussion of racial discrimination during the zoning hearing, there was not, as discussed *supra*, full and fair opportunity for litigation of that issue at that time.

However, for reasons unrelated to preclusion, the district court abstained from deciding and dismissed Count III because of the pending Lake Lucerne state action. Relying upon the factors articulated by the Supreme Court in *Moses H. Cone*, Judge Spellman concluded that a Florida state court would be the most efficient and appropriate forum for resolution of the civil rights claims.

In *Noonan South, Inc. v. The County of Volusia*, 841 F.2d 380 (11th Cir.1988), Judge Vance, writing for this court, wrote that in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court had "suggested" that when there is a pending "parallel state court action, . . . federal

courts [should] consider a number of factors in determining the appropriateness of dismissal: (1) whether one of the courts has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; . . . (4) the order in which the forums obtained jurisdiction"; and that in *Moses H. Cone*, the Supreme Court had "mentioned two additional factors: (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the parties' rights." *Noonan South*, 841 F.2d at 381. Our application of those factors leads us to disagree with the district court's dismissal of Count III on abstention grounds.

Jurisdiction over property is not implicated in either the stayed state or the instant federal action, and each forum would appear equally convenient for the parties. As to the potential for piecemeal litigation, counsel for appellants, during oral argument before us, specifically stated their desire to move ahead in this federal case and have continued the existing stay in the state action. Accordingly, there is little or no potential for duplicative or simultaneous

[878 F.2d 1374]

litigation of the issues raised in Count III in state and federal forums.

Emphasis upon the order in which the forums obtained jurisdiction "does not turn on which complaint was filed first. Instead, it is measured 'in terms of how much progress has been made in the two action.' " *Noonan South*, 841 F.2d at 382, *quoting Moses H. Cone*, 460 U.S. at 21, 103 S.Ct. at 940. In the instant case, the record indicates that there has been little activity in the state court case and that there will be little or none prior to resolution of the issues being remanded to the federal district court pursuant to this opinion.

As for the final two factors added by the Supreme Court in *Moses H. Cone*, whether the civil rights issues raised in Count III are determined in state or federal court, federal law will govern their adjudication. While, like the district court, we are convinced that "[t]here is absolutely no reason why the courts of the state of Florida are any less competent than [a federal] court to adjudicate the civil rights claim at issue,"[14] the sixth "factor will only weigh in favor or against dismissal when one of the forums is *inadequate* to protect a party's rights." *Noonan South*, 841 F.2d at 383.

In short, since "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244, since "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention," *Noonan South*, 841 F.2d at 381, *quoting Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246, and since appellants have indicated by their actions their desire to pursue their federal civil rights claim in federal court only, we reverse the district court's dismissal of Count III and remand appellants' contentions in Count III, as well as appellants' taking claim in Count II, for further appropriate proceedings in the federal district court.[15]

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[14] Judge Spellman's opinion at p. 5.

[15] After oral argument, some of appellees filed a Motion to Dismiss Because of Lack of Subject Matter Jurisdiction. Appellants responded with a Motion to Strike and Motion for

(Continued on following page)

AFFIRMED in part; REVERSED in part; and REMANDED for further proceedings consistent with this opinion.[16]

(Continued from previous page)

Sanctions. Both motions are denied. In this appeal, review is not sought of state court judgments; rather, appellants seek reversal, *inter alia*, of the district court's application of preclusion principles. Appellees' argument is misplaced. However, we do not find it to be frivolous. *See Hollins v. Wessel*, 819 F.2d 1073, 1074 (11th Cir.1987).

[16] On remand, the district courts' assessment of costs upon appellants should be considered anew.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No.: 87-1546-Civ-SPELLMAN

LAKE LUCERNE CIVIC ASSN.,
INC., et al.,

Plaintiffs,

DOLPHIN STADIUM CORPORATION,
et al.,

Defendants.

_____/

JUDGMENT
(Filed April 7, 1988)

THIS CAUSE having come before the Court upon the the Defendants' Motions to Dismiss and for Summary Judgment, and the Court having considered said Motions, including the extensive transcripts generated and opinions rendered by the Courts of the State of Florida pertaining to the matters raised in said Motions, and a decision on said Motions having been duly rendered by this Court on March 22, 1988, it is thereupon

ORDERED AND ADJUDGED that:

1. The Defendants' Motions are granted.

2. Counts I and II of Plaintiffs' Complaint are dismissed with prejudice and Count III of Plaintiffs' Complaint is dismissed with prejudice from the United States District Courts, but without prejudice to further State Court proceedings.

3. Plaintiffs shall take nothing by this suit and Defendants shall go hence without day.

4. Defendants shall recover their costs of this action from Plaintiffs which sum shall be determined upon subsequent Motion of Defendants.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 7 day of April, 1988.

/s/ Eugene P. Spellman
United States District Court Judge

Copies furnished to:
All counsel of record

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 87-1546-CIV-
SPELLMAN

LAKE LUCERNE CIVIC ASS'N
INC., et al.,
Plaintiffs,

-vs-

DOLPHIN STADIUM CORP.,
etc., et al.,
Defendant.
_____/

ORDER GRANTING FINAL SUMMARY JUDGMENT FOR DEFENDANTS AS TO COUNTS I AND II OF THE COMPLAINT AND DISMISSING COUNT III UNDER PRINCIPLES OF ABSTENTION
(Filed March 22, 1988)

THIS CAUSE comes before the Court upon Defendants' Motions to Dismiss and for Summary Judgment. The Court has carefully reviewed the record, and the exhibits filed with these Motions, including extensive transcripts and opinions issued by the courts of the state of Florida pertaining to these matters.

The Court will refrain from recounting in detail the background of this case which apparently has been adequately recounted by numerous courts that have considered the matters herein raised. In brief, the Plaintiffs have filed a three count complaint with this Court. Count I alleges "Unconstitutional Impairment of Contract

Rights." Count II alleges "Substantive Unconstitutionality of Zoning Resolution." Finally, Count III alleges "Violation of Civil Rights." The Defendants challenge the Complaint on a number of bases, the most obviously meritorious of which is res judicata and collateral estoppel.

These doctrines of finality developed for the very sound policy reason that litigation should ultimately come to a final stop. The facts before this case clearly demonstrate the utility of the policy of finality. The Dade County zoning board rendered a decision against the Plaintiffs in this action approving of the construction of a sports complex near the Plaintiffs' homes despite their assertion that such construction was impermissible by virtue of restrictive covenants within the deeds pertaining to the area. Subsequently, the Plaintiffs appealed the decision of the administrative tribunal to the courts of the State of Florida.

In Count I of the Complaint, the Plaintiffs claim that the Defendants, by allegedly "invalidating" the restrictive covenant that would have prohibited the Defendants from constructing the stadium in the Plaintiffs' community, effected an "unlawful impairment of private contract rights in violation of Article I, Section 10 of the United States Constitution." The Plaintiffs "allege specifically that the issues raised in counts I and II have not been previously decided." Plaintiffs Response to Dolphin Stadium Corporation's Motion to Dismiss of September 4, 1987, at 4. The Court, however, clearly finds this representation to have been incorrect.

First, under the doctrine of res judicata, the Plaintiffs should have brought all claims arising out of the same core of facts in the first proceeding. Thus, when the Plaintiffs challenged the substantive accuracy of the Defendants' construction of the covenant, the Plaintiffs' could have and should have challenged its constitutionality as well, assuming that it did not do so. To not have done so clearly falls within the rubric of "claim splitting." *See E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970). The Plaintiffs have attempted to recast the same facts and claims that have been decided by the trial and appellate courts of this state as Constitutional claims. *See Hollins v. Wessel*, 819 F.2d 1073 (11th Cir. 1987).

Moreover, under the doctrine of collateral estoppel, it appears that the constitutional issue was raised. In the Plaintiff's Amended Petition for Writ of Certiorari, the Plaintiffs presented the issue as follows: "In deleting the restrictive covenant, at the request of a private party to the contract, solely by a zoning resolution, DADE COUNTY unreasonably impaired Petitioners' contractual rights by a legislative act in violation of Article I, Section 10 of the Florida and Federal Constitutions." Thus, it appears that either the Plaintiffs raised the constitutional issue and that it was decided, or that they should have raised it. *See Albrecht v. State*, 444 So. 2d 8 (Fla. 1984).

Assuming arguendo that the constitutional issue was not decided in state court, collateral estoppel still applies. The state courts held, and on appeal affirmed, that the terms of the restrictive covenant had not been violated by the release of the covenant. Thus, no contractual right has been impaired. Therefore, there is no basis for an analysis

of unconstitutional impairment and Count I of the Complaint is barred under the doctrines of res judicata, collateral estoppel, or both.

The second count of the complaint is similarly barred. The Plaintiffs allege in this Count that the zoning resolution was substantively unconstitutional. In their Amended Petition for Writ of Certiorari, their Reply Brief and their subsequent Motion for Rehearing, which has been denied, the Plaintiff argue, *inter alia*, that "[z]oning is arbitrary and unreasonable by legislative standards where the impacts of a proposed commercial development would alter the character of adjacent residential communities, presents a threat to the health, safety and welfare of its inhabitants, and otherwise is not needed in the location." The same analysis applies here. The Plaintiffs either litigated the constitutionality of the zoning resolution in the state court or it could have and should have done so.

Moreover, the Appellate Division of the Eleventh Judicial Circuit Court found that there was a reasonable relationship between the police power of the state and the resolution and that the zoning at issue was not "fairly debatable." On May 20, 1987, the Third District court of Appeals, *per curiam*, denied the Plaintiff's Petition for Certiorari upheld "the Dade County Circuit Court's affirmance of the zoning resolution rezoning the affected property . . . "

The Court is of the opinion that the claim which the Plaintiffs seek to litigate in this case are substantially identical to that litigated in state court and affirmed by

the Third District Court of Appeals. Therefore, the Plaintiffs are collaterally estopped from relitigating this issue before this Court. Moreover, assuming that the claim in any way differs from that previously litigated, the facts out of which it arises are substantially identical. Therefore, the second count of the complaint amounts to claim splitting, and thus is also precluded by the doctrine of res judicata.

As to the third Count of the Complaint, the Court is of the opinion that it should abstain from exercising its jurisdiction on this issue. Dismissal under the abstention doctrine is appropriate in this case on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15 (1983) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)). As the Supreme Court noted in *Moses H. Cone Hospital*, several factors need to be considered by a Federal District Court in determining the propriety of abstaining from hearing a federal claim that is simultaneously pending in state court: the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the order in which jurisdiction was obtained by the concurrent forums; the presence in the suit of extensive rights governed by state law; and the litigant's previous willingness to litigate similar suits in state court. A careful consideration of these factors clearly demonstrates the propriety of abstention in this case. *Id.*

If this Court were to consider the Plaintiffs' civil rights claim at this stage, it would result in piecemeal

litigation. There is absolutely no reason why the courts of the state of Florida are any less competent than this Court to adjudicate the civil rights claim at issue. The state courts have adjudicated nearly all of the issues that have arisen out of the same key set of facts out of which this civil rights claim purportedly arose. It would be a gross waste of this Court's judicial resources to consider the merits of this case as profoundly as would be necessary to resolve this matter, when the state court has been adjudicating the relevant issues in this case for nearly four years.

Significantly, the Plaintiffs' civil rights claim in state court is virtually identical with that filed before this Court. Moreover, the state court claim was filed approximately fourteen months before the claim was filed in this Court. It would be extremely unwise for the Court to consider the propriety of abstention only in light of the pendancy in state court of the civil rights claim. The state court action as a whole has been proceeding for four years and, has reached the appellate level of the state court system.

This was not a case in which two adversaries both brought simultaneous actions arising out of the same facts in different fora as was the case in *Moses H. Cone Hospital;* rather, it involves the same Plaintiffs who have brought the same action twice in two different fora. Such action clearly raises a very strong inference of forum shopping, particularly inasmuch as the states court's previous adjudications had not proved very favorable to the Plaintiffs. Up until this point in time, the Plaintiffs have been extremely willing to pursue relief in the state court. The Plaintiffs have not substantiated that the state court

proceedings were less than fair. Therefore, the simultaneous adjudication by this Court of the Plaintiffs' civil rights claim would constitute an unjustifiable and gross misuse of federal judicial resources.

Finally, the resolution of the civil rights claims at issue could force the adjudicating court to draw heavily on present and past zoning practices of Dade County and several other matters of a uniquely local nature. It would be more appropriate for the state court to resolve these matters. Thus, for the foregoing reasons, this Court abstains from exercising jurisdiction as to the Plaintiffs' civil rights claim. *See Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838 (9th Cir. 1979); *East Naples Water Systems, Inc. v. Board of County Commissioners of Collier County*, 627 F. Supp. 1065 (S.D. Fla. 1986). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motions for Summary Judgment are **GRANTED** as to Counts I and II of the Complaint. As to the final count of the Complaint, the Court hereby ABSTAINS from exercising jurisdiction as to this claim; accordingly, the Defendants' Motion to Dismiss this Count of the Complaint is **GRANTED**. It is further ORDERED that the Plaintiffs' pending Motions for summary judgment and for preliminary injunctive relief are hereby rendered MOOT.

DONE AND ORDERED in Chambers at Miami, Florida this 22 day of March, 1988.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT
JUDGE

cc: all counsel of record

[511 So.2d 1009]

NORWOOD-NORLAND HOMEOWNERS' ASSN., INC., Lake Lucerne Civic Assn., Inc., Crestview Homeowners' Assn., Inc., Rolling Oaks Homeowners' Assn., Inc., Mildred Harris, Barry Young, Elbert Waters, Betty Ferguson and Leon Bland, Petitioners,

v.

DADE COUNTY, Dolphin Stadium Corporation, Inc., Emil Morton, Lawrence Morton, Lottie Morton d/b/a Morton Properties, Respondents.

No. 86-2309.

District Court of Appeal of Florida,
Third District

May 20, 1987.

Rehearing and Certification Denied
Sept. 21, 1987.

Certiorari was sought to review order of the Circuit Court, Dade County, Allen Kornblum, Michael H. Salmon and Steven D. Robinson, JJ., which upheld zoning amendment for construction of proposed professional football stadium. The District Court of Appeal held that: (1) determination that proposal was consistent with master plan was supported by the record, and (2) purported release of restrictive covenant on a portion of the property was affected.

Petition denied.

[511 So.2d 1010]

George F. Knox of Long & Knox and H.T. Smith, Miami, for petitioners.

Robert A. Ginsburg, Dade Co. Atty., and Robert L. Krawcheck, Asst. Co. Atty., Miami, for respondent-Dade County.

Robert L. Shevin and Brian S. Dervishi of Sparber, Shevin, Shapo, Heilbronner & Book, P.A., Miami, for respondent-Dolphin Stadium Corp.

Stephen H. Reisman and Donald S. Rosenberg of Rosenberg Reisman & Glass, Miami, for respondent-Morton Properties.

PER CURIAM.

This petition for writ of certiorari, as amended, is the second challenge brought to this court by homeowners' associations and individual property owners contesting the construction of the proposed Dolphin Stadium and adjoining complex involving approximately 432 acres in northwestern Dade County. We deny the petition and uphold the Dade County Circuit Court's affirmance of the zoning resolution rezoning the affected property and releasing a part of it from a restrictive covenant.

Petitioners' first appeal was from an order dismissing their third amended complaint in a multi-count action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, which this court affirmed in part and reversed and remanded on certain counts. *Rolling Oaks Homeowners' Association v. Dade County*, 492 So.2d 686 (Fla. 3d DCA 1986). In this second challenge, petitioners seek review by certiorari of a three-judge panel decision by the Circuit Court in and for Dade County, rendered in its appellate capacity, which affirmed the Dade County Commission's approval of zoning resolution Z-211-85, rezoning the property known as the Lake Lucerne site for the proposed Dolphin Stadium Complex.

The zoning resolution adopted by the Dade County Commission implemented certain zoning changes including an "unusual use" zoning designation for the stadium, and cancelled a restrictive covenant governing density limits on development of one portion of the Lake Lucerne site. The restrictive covenant, which governed only one portion of the land, owned by Emil Morton, Lottie Morton and Lawrence Morton, individually and as trustees d/b/a Morton Properties (the Mortons), was contained in a document entitled "Covenant Governing Land Development," entered into between the Mortons and the developer and Metropolitan Dade County, dated February 16, 1977. The parties agreed to certain lower density uses of the subject property, including use as a park, for a school, etc. The

[511 So.2d 1011]

parties further agreed to the following conditions for modification or release of the covenant's restrictions on use:

> *Modification; Release:*
>
> This Agreement may be modified, amended, or released as to any portion of the land described herein by a written instrument executed by the then-owner of the fee-simple title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan

Dade County, Florida, whichever by law has jurisdiction over such subject matter.

Under Metropolitan Dade County's Comprehensive Development Master Plan for Land Use, (Master Plan), the site of the proposed development is designated low density or low-medium density residential use. However, a portion of the property is designated as a Sub-Metropolitan Activity Center under the Master Plan. The Master Plan describes activity centers as follows:

Activity Centers

Diversified activity centers will become the main hubs for future urban deveolopment [sic] in Dade County, resulting in a more compact and efficient urban structure. These desig-nunified complexes will house commercial facilities, offices, high-rise apartments, and public facilities such as hospitals and educational institutions. Metropolitan mass transit service should be provided directly to the centers, as should direct connections to a nearby expressway or principal arterial to ensure a high level of countywide accessibility. They would contain a concentration of different urban functions integrated both horizontally and vertically. These centers would be characterized by physical cohesiveness and an intensive usage of land.

The Plan map indicates both emerging and proposed activity centers. New centers are proposed in areas having the following qualities: good countywide accessibility by both roadways and mass transit; compatibility with future surrounding development; and programmed provision of public services. Special emphasis should be given to providing rapid transit service to the greatest number of metropolitan and regional centers.

In March, 1985, Dolphin Stadium Corporation submitted a zoning application to rezone the entire 432 acre site. This application was amended and a second application was submitted to the Dade County Building and Zoning Department in April, 1985. Dolphin Stadium Corporation requested approval for a development of regional impact, (DRI), particularly a recreation/office/retail/hotel complex. It also requested district boundary changes from townhouse classifications to office park district, motel/hotel, "unusual use" designation to permit the stadium itself, a helicopter landing pad, and deletion of the Covenant governing Land Development recited earlier. After a seven-hour public hearing, the Metropolitan Dade County Commission passed Resolution Z-211-85 and an accompanying development order approving the DRI.

Petitioners filed an appeal to the Dade Circuit Court from the County Commission's decision, which resulted in affirmance by the majority of a three-judge panel, with a dissenting opinion by Judge Steven D. Robinson. The majority concluded that petitioners had failed to show that rezoning the Lake Lucerne property for construction of a sports stadium complex constituted a deviation from the Master Plan, and further concluded that the restrictive covenant governing the Morton property had been properly released. The court also determined that the zoning resolution adopted by the County Commission was "fairly debatable," and should be upheld. Judge Robinson dissented only on the issue of release of the restrictive covenant. He cited the covenant's requirement of a vote of consent for its release by "a majority of property owners," and disagreed with the County Commission's interpretation of that

[511 So.2d 1012]

term to allow one lot owner of a

subdivision to obtain a separate vote for each lot owned. Petitioners now seek relief from the circuit court's affirmance of the zoning resolution by petition for writ of certiorari.

STANDARDS OF REVIEW OF ZONING CHALLENGE

The standard of review for circuit courts *directly* reviewing agency or municipal zoning cases is by now well established. The circuit court is charged with determining whether the agency or municipality accorded procedural due process rights, observed the essential requirements of law, and supported its findings with substantial, competent evidence. It is axiomatic that "zoning or rezoning is the function of the appropriate zoning authority and not the courts. . . ." *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla.1978). Reviewing courts are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives. *S.A. Healy Company v. Town of Highland Beach*, 355 So.2d 813 (Fla. 4th DCA 1978). Instead, the scope of review is one which recognizes a zoning authority's power to impose reasonable regulations in furtherance of health, safety and community welfare, and to determine, on the evidence before the court, whether the local authority's zoning decision is "fairly debatable." The "fairly debatable" test asks whether reasonable minds could differ as to the outcome of a hearing. If so, the court should sustain a county commission's resolution. *Dade County v. United Resources, Inc.*, 374 So.2d 1046 (Fla. 3d DCA 1979); *Davis v. Sails*, 318 So.2d 214 (Fla. 1st DCA

1975); *City of Miami v. Schutte*, 262 So.2d 14 (Fla. 3d DCA 1972).

The scope of *this* court's review of a circuit court order rendered in its appellate capacity in an administrative action is even narrower. As pronounced in *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982), this court's review is limited to determining whether procedural due process was afforded, and whether the correct law was applied. *Tomeu v. Palm Beach County*, 430 So.2d 601 (Fla. 4th DCA 1983). Petitioners are *not* entitled to a second or third full appeal in this court. *Metro Dade County Fair v. Sunrise Village*, 485 So.2d 865 (Fla. 3d DCA 1986).

However, as noted recently in *Southwest Ranches Homeowners Association v. County of Broward*, 502 So.2d 931 (Fla. 4th DCA 1987), the standards do not necessarily end here. When, as appears in this case, the zoning authority has approved a use more *intensive* than that proposed by the plan, the decision must be subject to "stricter scrutiny" than the "fairly debatable" standard contemplates. Zoning decisions must not only meet the "fairly debatable" standard, but they also should be "consistent" with the comprehensive land use plan. *Southwest Ranches, supra*, at 939-40.

The statutory definition of "consistency" is contained in section 163.3194(3), Florida Statutes, as recently amended, which provides:

> (3)(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development

permitted by such order or regulation *are compatible with* and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. [Emphasis added.]

Sections 163.3194(4)(a)-(b) of the Local Government Comprehensive Planning and Land Development Regulation Act provide a broad range of factors for determining consistency with a comprehensive plan:

[511 So.2d 1013]

(4)(a) A court, in reviewing local government actior or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.

(b) It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives.

ZONING AND THE LAND USE PLAN

Petitioners' first argument is that the development order and zoning resolution approved by the Dade County Commission violated the Master Plan, and that the circuit court therefore departed from the essential requirements of law in affirming the Commission's decision to allow the rezoning. However, our review of the record supports the contrary conclusion. As the circuit court observed, the Master Plan designates some or all of the Lake Lucerne site as a Sub-Metropolitan Activities Center, which sanctions uses such as shopping centers, general business districts, office parks, government centers, cultural and/or recreational complexes. Also, the record contains a Dade County Development Impact Committee report that the proposed Dolphin Stadium complex and related commercial development is compatible and in keeping with the Master Plan, and in basic context with its goals and policies. Given the Master Plan's own use designations, and evidence of the stadium's compatibility, we conclude that petitioners have failed to show how the circuit court departed from or misapplied the law in finding that rezoning for the stadium and retail/hotel/office complex was not a deviation from the Master Plan. Neither do we find any denial of petitioners' procedural due process rights in any of the proceedings leading up to the County Commission's adoption of the zoning resolution.

TERMINATION OF THE RESTRICTIVE COVENANT

Petitioners' second argument is that the circuit court erred in upholding the Commission's adoption of the zoning resolution, which impliedly recognized the effective release of the restrictive covenant on a portion of the property. In exchange for dedicating the land for a park or public purposes and granting Dade County School Board an option on another parcel, the owners and developer agreed to low and medium density housing, parks and schools. The covenant allowed the owners to apply for zoning changes, but provided that before its modification, amendment or release, "a majority of the property owners within 350 feet of the property for which such modification is proposed" would have to consent, as well as "a majority of the property within 350 feet of the property shown in the [development] Plan."

Apparently, respondents were unable to garner the necessary consents due to resistance from area homeowners. The respondents thereupon amended their initial rezoning application to reduce the area involved, creating a 351 foot set back from the border of the Rolling Oaks and Crestview developments, in an effort to eliminate the property owners of that area as owners required to consent to the release of the restrictive covenant. Respondents obtained consents from property owners within a distance of 350 feet from the reduced area. Also, they presented consents from what they tabulated as a simple majority of the acres surrounding the entire development. The County assigned one vote for each parcel owned, so that several of the owners who owned more than one parcel had more than one vote.

Petitioners challenged on appeal in the circuit court, and in this proceeding, the deliberate reduction of the affected property in the rezoning application, arguing that

[511 So.2d 1014]

it was gerrymandering in violation of the intent of the restrictive covenant. However, notwithstanding the respondents' obvious intentions behind the amendment of their rezoning application, drawing the lines in by 351 feet to obtain a majority vote, respondents' actions were in full compliance with the restrictive covenant. Respondents had every right to amend their rezoning application to meet the voting requirements for release of the covenant. Petitioners have not shown a misapplication of the law in the circuit court's affirmance of this point.

Petitioners also challenge the manner in which the number of owners was calculated in tabulating a vote of a majority of the affected property owners. They argue that the County Commission erred in construing the restrictive covenant to allow affected property owners to vote one time for each separate parcel owned. Instead, petitioners interpret the covenant to require a majority of affected property owners without regard to the number of separate parcels owned by each. In upholding the commission, the circuit court gave weight to the county's interpretation, and found that petitioners had failed to meet their burden of showing that the county's construction was clearly erroneous.

It is settled by Florida case law that covenants are strictly construed in favor of the free and unrestricted use of property. Where the terms of a covenant are unambiguous, the courts will enforce such restrictions according to the intent of the parties as expressed by the clear

and ordinary meaning of its terms. A covenant which is substantially ambiguous is resolved against the party claiming the right to enforce the restriction. *Moore v. Stevens*, 90 Fla. 879, 106 So. 901 (1925); *Snider v. Grodetz*, 442 So.2d 344 (Fla. 5th DCA 1983); *Barrett v. Leiher*, 355 So.2d 222 (Fla. 2d DCA 1978).

In this case, the provisions for release of the restrictive covenant are susceptible to different interpretations. There was no evidence in the record as to the parties' intentions in drafting the covenant, or compelling the interpretation urged by petitioners as opposed to respondents' construction, allowing an owner to vote once for every lot owned. Indeed, the circuit court observed that it is likely that the developers who were parties to the covenant fully intended to retain majority control over the land until subdivided and sold. One vote per lot owned would be consistent with that intention. Since the respondents' interpretation of the covenant to allow one vote for each lot owned is consistent with the pronounced policy against land restrictions, and is supported by the record, we will not disturb the circuit court's decision to uphold the Commission's finding of a majority vote authorizing release of the covenant.

Finally, petitioners argue that the circuit court departed from the law in striking several of their exhibits in their appendix on direct appeal. The circuit court's examination of the record revealed that the disputed exhibits were not made part of the record below and were not properly before the court on appeal. Our review of the portions of record provided to us by the parties supports the circuit court's order striking the exhibits.

Accordingly, the amended petition for writ of certiorari is denied.

DOWNEY, JAMES C., DELL, JOHN W., and WALDEN, JAMES H., Associate Judges, concur.

[520 So.2d 585]

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT – Continued

Title	Docket Number	*Date	Disposition	**Appeal from and Citation
Norwood-Norland Home-owners' Ass'n v. Dade County	71297	2/10/88	Rev. den.	3d DCA 511 So.2d 1009

*Date of decision or date rehearing denied (if requested).

**Court or agency rendering decision appealed and citation (if reported).

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5383

D.C. Docket No. 87-1546

LAKE LUCERNE CIVIC
ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

versus

DOLPHIN STADIUM CORP., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and REVERSED in part; and

that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

Entered: August 3, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: OCT 13 1989